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AMERICAN AND BRITISH CLAIMS ARBITRATION.

THE "WANDERER."

ANSWER OF THE UNITED STATES.

AMERICAN AND BRITISH CLAIMS ARBITRATION.

THE WANDERER.

Answer of the United States.

The United States, in answering the memorial of His Britannic Majesty's Government in support of the claim entitled "*The Wanderer*," admits the following facts:

That the *Wanderer* was a schooner of 25 tons burden, sailing under the British flag, and engaged in hunting fur seals in the North Pacific Ocean in the winter and spring of 1894; that the regulations included in the award of the Bering Sea Tribunal of 1893 were adopted and put into operation as to British vessels by the British "Behring Sea Award Act, 1894," passed April 23, 1894, by the British "Behring Sea Award Order in Council, 1894," issued April 30, 1894, and by the diplomatic arrangement between the governments of the United States and of Her late Britannic Majesty, entered into on May 11, 1894; that the *Wanderer* was, on June 9, 1894, boarded by an officer of the U. S. S. *Yorktown*, one of the patrolling squadron in the North Pacific Ocean, and certain sealing implements having been sealed and the number of sealskins on board the schooner certified, a license was issued, at the request of the master, for the vessel to seal in Bering Sea during the open season, which began on August 1, 1894; that subsequently, on the same day, the *Wanderer* was again boarded by an officer of the U. S. S. *Concord*, another of the patrolling squadron, who searched the vessel and found a shotgun and ammunition concealed in addition to the guns and ammunition

sealed by the officer of the *Yorktown*; that on June 10, 1894, at St. Paul, Kadiak Island, the commander of the cruiser *Concord*, pursuant to the authority conferred upon him by the Behring Sea Award Act and Order in Council, seized the *Wanderer* and sent her to Unalaska; that the *Wanderer* was detained at Unalaska in the custody of the naval authorities of the United States until the arrival of a British naval vessel, when she was promptly delivered into the custody of the British Senior Naval Officer, who, on August 5, 1894, sent her to Victoria, B. C.; and that upon arriving at Victoria the *Wanderer* was released from custody by order of the British Naval Commander-in-Chief on the Pacific Station.

The United States denies any and all liability in this case for the following reasons:

I. The officer of the U. S. S. *Concord*, in seizing the *Wanderer*, acted under and by virtue of the authority conferred upon him by the "Behring Sea Award Act, 1894," and the "Behring Sea Award Order in Council, 1894," and in making the seizure the officer in command of the *Concord* was acting on behalf of Her Majesty the Queen, and not on behalf of the United States.

II. The seizure was made in the *bona fide* belief that the "Behring Sea Award Act, 1894," had been violated. Under the provisions of that act the seizing officer cannot be held liable until it is affirmatively established before a competent court that the seizure was without reasonable cause.

III. The action of the naval authorities of Her Majesty in releasing the *Wanderer* was in direct violation of the diplomatic agreement between the two governments, and was not authorized by British law; His Majesty's Government are therefore estopped from asserting any liability

on the part of the United States, since by the wrongful act of their naval officers they rendered it impossible to determine in the only competent way the illegality of the seizure.

IV. If the *Wanderer* had been brought to trial, and if the court had found that the seizure was illegal and without probable cause, Her Majesty would have been liable, and damages would have been assessed in favor of the owners.

V. If the United States could be held liable for the seizure of the *Wanderer*, which is denied, His Majesty's Government would still be liable for the detention of the *Wanderer* from and after July 1, 1894, the date the vessel arrived at Unalaska, the subsequent detention of the vessel being due to the failure of the British naval authorities to send a vessel there to take charge of the *Wanderer*.

VI. There is no basis in law or in fact for the measure of damages set forth in the memorial, and aside from any other consideration the claim should be disallowed for failure of proof of damages.

I. *The officer of the U. S. S. Concord, in seizing the Wanderer, acted under and by virtue of the authority conferred upon him by the "Behring Sea Award Act, 1894," and the "Behring Sea Award Order in Council, 1894," and in making the seizure the officer in command of the Concord was acting on behalf of Her Majesty the Queen, and not on behalf of the United States.*

By Article 2 of the Regulations adopted by the Award of the Tribunal of Arbitration constituted under the Treaty of the 29th of February, 1892, between the United States and Great Britain, it was provided that "The two Governments shall forbid their citizens and subjects, respectively, to kill,

capture, or pursue, in any manner whatever, during the season extending, each year, from the 1st of May to the 31st of July, both inclusive, the fur seals on the high sea, in the part of the Pacific Ocean, inclusive of the Behring Sea, which is situated to the north of the 35th degree of north latitude, and eastward of the 180th degree of longitude from Greenwich till it strikes the water boundary described in article 1 of the treaty of 1867 between the United States and Russia, and following that line up to Behring Straits.”¹

By appropriate legislation the governments of the United States and Great Britain arranged to give effect to these regulations in the spring of 1894. By the British Act of the 23d of April, 1894, known as the “Behring Sea Award Act, 1894,”² it was provided that the provisions of the Bering Sea Arbitration Award “shall have effect as if those provisions were enacted by this act, and the acts directed by articles 1 and 2 thereof to be forbidden were expressly forbidden by this act.”

And further, that, “if there is any contravention of this act, any person committing, procuring, aiding, or abetting such contravention shall be guilty of a misdemeanor within the meaning of the Merchant Shipping Act, 1854, and the ship employed in such contravention, and her equipment, and everything on board thereof, shall be liable to be forfeited to Her Majesty as if an offense had been committed under section 103 of the said act.”³

Paragraph 5 of section 1 of the Act provided that section 103 of the Merchant Shipping Act should apply to offenses under this act, which section of the Merchant Shipping Act is as follows:

¹ Appendix, p. 54.

² Appendix, p. 58.

³ Appendix, p. 59.

“SECTION 103. * * * And in order that the above provisions as to forfeitures may be carried into effect, it shall be lawful for any commissioned officer on full pay in the military or naval service of Her Majesty, or any British officer of customs, or any British consular officer, to seize and detain any ship which has, either wholly or as to any share therein, become subject to forfeiture as aforesaid, and to bring her for adjudication before the high court of admiralty in England or Ireland, or any court having admiralty jurisdiction in Her Majesty’s dominions; and such court may thereupon make such order in the case as it may think fit, and may award to the officer bringing in the same for adjudication such portion of the proceeds of the sale of any forfeited ship or share as it may think right.”⁴

Section 3, paragraph 3, of the Behring Sea Award Act, provided that “An order in council under this act may provide that such officers of the United States of America as are specified in the order may, in respect of offences under this act, exercise the like powers under this act as may be exercised by a commissioned officer of Her Majesty in relation to a British ship, and the equipment and certificate thereof, or such of those powers as appear to Her Majesty in council to be exercisable under the law of the United States of America against ships of the United States; and that such British officers as are specified in the order may exercise the powers conferred by this act, with any necessary modifications specified in the order, in relation to a ship of the United States of America, and the equipment and certificate thereof.”⁵

⁴ Appendix, p. 65.

⁵ Appendix, p. 60.

The American act, putting into effect the regulations, contained a similar provision authorizing British officers to seize vessels of the United States guilty of contravening the act of Congress and the President's proclamation.⁶ The Government of the United States gave due notice to Her Majesty's Government of the names of the vessels and the officers in command assigned by the President for patrol duty in the award area,⁷ and proper instructions were issued to the commanding officers with respect to the action they should take against offending vessels, both American and British. These instructions, in so far as they relate to the action to be taken against British vessels, were submitted to Her Majesty's Government for approval, and the original draft was amended to meet certain objections raised by Her Majesty's Government.⁸ The instructions, which were approved by Her Majesty's Government, and finally promulgated on the 4th of May, 1894, were substantially the same as those issued to British officers assigned to the same duty. The instructions to American officers contained the following provisions:⁹

“You will order the vessels under your command to warn all American and British vessels they may meet not to engage in fur-seal fishing within the area of the award, during the periods of time in which fur-seal fishing is forbidden, and to deliver to the master of each of such vessels a copy of the President's proclamation, of the act of Congress, approved April 24, 1894, of the President's regulations governing vessels employed in fur-seal fishing, of the British act, and of these instructions.

⁶ Federal Statutes Annotated, p. 418.

⁷ Appendix, p. 81.

⁸ Appendix, pp. 81, 85, 87.

⁹ Appendix, p. 88.

“Whenever a vessel may be warned, the commander of the cruiser, or the customs officer, as the case may be, shall, after making an examination of the vessel, leave with the master of said vessel a certificate showing the date and place of examination, the number of seal skins, and the number of bodies of seals then on board, and shall preserve a duplicate of said certificate. And no officer, subsequently boarding such vessel, shall seize the same, unless he shall be satisfied, as herein provided, that it has committed a violation of law by killing fur-seal within the area of the award, subsequent to the 30th day of April, 1894.

* * * * *

“If a vessel which appears to be a sealing vessel is found within the area of the award, during the periods of time in which fur-seal fishing is forbidden, you will ascertain whether she is there for the purpose of fur-seal fishing, whether she has been engaged in fur-seal fishing, whether she was carried there by stress of weather, by a mistake during foggy or thick weather, or is there in the ordinary course of navigation making the best of her way to any place. You must judge whether such vessel has been engaged in fur-seal fishing from the presence of seal skins or bodies of seals on board, and from other circumstances and indications. If such vessel is found outside of the area of the award, and it is evident that she has been engaged in fur-seal fishing within said area, and has thus committed an offense, you will order her seized. A vessel may violate the law by her boats fur-seal fishing within said area, while the vessel herself is outside of said area.”

The instructions issued to British officers contained a clause reading as follows:¹⁰

¹⁰ Appendix, p. 86.

“If a vessel which appears to be a sealing vessel is found in any waters in which, at the time, hunting is prohibited, you will ascertain whether she is there for the purpose of hunting, or whether she has hunted, or whether she was carried there by stress of weather, or by mistake, during fog, or is there in the ordinary course of navigation on her passage to any place.

“If you are satisfied that the vessel has hunted contrary to the act, you will seize her and order her to proceed to the British port hereinafter mentioned; but if you are of opinion that no offense has been committed you should warn her and keep her, as far as you think necessary and as is practicable, under supervision.

“Whether this vessel has been engaged in hunting you must judge from the presence of sealskins or bodies of seals on board and other circumstances and indications. If the vessel is found outside the specified limits and it is evident that she had been hunting within those limits, and that thus an offense has been committed, you will seize her and send her to port.

“A vessel, though herself not within the prohibited limits, may violate the act by her boats hunting within such limits.”

The effect of the concurrent legislation and the regulations adopted and promulgated by the two governments was that, for certain specified purposes, a joint patrol was established, and to all intents and purposes each government constituted the officers of the other government its agents for the purpose of enforcing the law as against its own vessels.

It follows, therefore, that any action taken in good faith by an American officer with regard to a British vessel under the authority of the British Act and the Order in Council, and under instructions approved by the British Govern-

ment, was on behalf of Her Majesty's Government, for which Her Majesty's Government were as much responsible as if such action had been taken by a commissioned officer of Her Majesty.

In the case of the *Wanderer* the action of the seizing officer was within the scope of the authority conferred upon him by Her Majesty's Government, and the seizure was made on behalf of Her Majesty and not on behalf of the Government of the United States.

II. *The seizure was made in the bona fide belief that the Behring Sea Award Act, 1894, had been violated. Under the provisions of that act the seizing officer cannot be held liable until it is affirmatively established before a competent court that the seizure was without reasonable cause.*

The facts and circumstances giving rise to the seizure of the *Wanderer* show beyond question that the seizing officer was acting in the *bona fide* belief that the *Wanderer* was hunting fur seals in contravention of the British Act and that he had reasonable grounds for such belief.

The *Wanderer* left the port of Victoria, B. C., in January, 1894,¹¹ and proceeded to seal along the coast until June 9th, forty days after the beginning of the close season. On that day, when in latitude 58° north and longitude 150° west, within the maritime area in which sealing was prohibited, she was overhauled by the United States cruiser *Yorktown*. The commander of the *Yorktown* delivered to the master of the *Wanderer* copy of the British Act, of the President's proclamation, and the Navy Department's instructions of May 4, 1894.¹² At the request of the master of the *Wanderer* the commander of the *Yorktown*, pursuant to the agreement entered into between the two governments, sealed

¹¹ Memorial, p. 5.

¹² Appendix, p. 27.

up the arms and ammunition produced by the master of the *Wanderer*, who represented to the boarding officer that they were all that there were on board,¹³ and after assuring himself that the crew of the *Wanderer* were qualified under the law to hunt fur-seals during the open season, the commander of the *Yorktown* issued a license to the *Wanderer* and certified to the number of sealskins on board.¹⁴

Later, on the same day, the *Wanderer* was visited by the United States cruiser *Concord*.¹⁵ An officer was sent on board who, in order to determine whether there was any evidence of seal-hunting since the warning to the master and the sealing up of the arms and ammunition on board, instituted a search of the vessel, which disclosed three boxes of primers, a shotgun, and cartridges loaded with buckshot, which were found concealed on board the vessel and which had not been produced to the officer of the *Yorktown* at the time the other arms and ammunition were sealed.¹⁶

The master of the *Wanderer* endeavored to evade responsibility by declaring that the mate owned the gun, and had concealed it and the cartridges without his knowledge.¹⁷ It is submitted, however, that this explanation is not a reasonable one. The entry made in the vessel's log specifically stated that "7 shotguns" were placed under seal by the boarding officer from the *Yorktown*.¹⁸ The *Wanderer* had been hunting fur seals for nearly five months with the same outfit, and it is scarcely conceivable that the master of a sealing vessel should not know the number of guns he had on board. On the contrary, the facts and circumstances prove that the master of the *Wanderer* wilfully deceived the officer

¹³ Appendix, p. 28.

¹⁴ Memorial, p. 6.

¹⁵ Memorial, p. 6.

¹⁶ Appendix, pp. 28, 29, 30.

¹⁷ Appendix, pp. 28, 30, 36.

¹⁸ Appendix, p. 27.

of the *Yorktown* at the time the guns and ammunition were sealed.¹⁹

This attempt to conceal from the boarding officers the presence of an unsealed gun and ammunition, together with the fact that the *Wanderer*, when she was boarded, had the same canvas set as was generally used by a sealing vessel in “dodging” for seals,²⁰ satisfied the boarding officer that the *Wanderer* was hunting fur-seals in contravention of the British act. Having reasonable grounds for this belief, it was his manifest duty to seize the vessel and deliver her to a British officer for trial.

As to the statement of the master of the *Wanderer* that the gun and ammunition had been concealed by the mate without his knowledge, and contrary to instructions, attention is called to section 4 of the “Behring Sea Award Act, 1894,” which provides as follows:²¹

“4. (1) Where any offence under this act has been committed by some person belonging to a ship, or by means of a ship, or the equipment of a ship, the master of the ship shall be deemed guilty of such offence, and the ship and her equipment shall be liable to forfeiture under this act;

“(2) Provided that if it is proved that the master issued proper orders for the observance, and used due diligence to enforce the observance of this act, and the regulations in force thereunder, and that the offence in question was actually committed by some other person without his connivance, and that the actual offender has been convicted, or that he has taken all proper means in his power to prosecute such

¹⁹ Appendix, pp. 28, 30.

²⁰ Appendix, p. 39.

²¹ Appendix, p. 61.

offender, if alive, to conviction, the master or the ship shall not be liable to any penalty or forfeiture other than such sum as will prevent any profit accruing by reason of the offense to the master or crew or owner of the ship.”

It is obvious that the intent of this provision of the British act was to hold the master of a vessel responsible for any offense committed by any person belonging to his ship until he had proved to the satisfaction of a court of competent jurisdiction that the offense was committed without his connivance, and that he had taken all proper means in his power to prosecute the actual offender. The seizing officer had no authority to discriminate between offenses committed by the mate and offenses committed by the master. The vessel was liable to seizure if there were reasonable grounds for believing that she was being used in hunting fur-seals during the closed season after having been duly warned of the provisions of the British act.

Section 104 of the Merchant Shipping Act, annexed to and made a part of the “Behring Sea Award Act, 1894,” contains the following provision:²²

“SECTION 104. No such officer as aforesaid shall be responsible, either civilly or criminally, to any person whomsoever, in respect of the seizure or detention of any ship that has been seized or detained by him in pursuance of the provisions herein contained, notwithstanding that such ship is not brought in for adjudication, or, if so brought in, is declared not to be liable to forfeiture, if it is shown to the satisfaction of the judge or court before whom any trial relating to such ship or such seizure or detention is held that there were reasonable grounds for such seizure or

²² Appendix, p. 65.

detention; but if no such grounds are shown, such judge or court may award payment of costs and damages to any party aggrieved, and make such other order in the premises as it thinks just.”

Inasmuch as the authority extended to American officers by the Order in Council of 1894²³ was the same as the authority vested in British officers, the exemption from responsibility applied to American officers when acting under the authority conferred upon them by the Order in Council. Before an American officer could be held liable for the seizure of a British vessel, it must be found by a court of competent jurisdiction that the seizure was illegal and was made without reasonable grounds.²⁴

That facts, similar to those giving rise to the seizure of the *Wanderer*, constituted reasonable grounds for the seizure of a British vessel by an American officer is amply demonstrated by the decisions of the Canadian courts in cases growing out of seizures in similar circumstances. In the case of the *E. B. Marvin*, seized in 1895 by the United States revenue cutter *Rush*, where the evidence relied upon was the presence of a sealskin on board containing a hole apparently made by a gunshot and a small discrepancy between the actual amount of ammunition and that appearing in the manifest, the vessel was released, but it was held that the arrest was justifiable. Upon this point Davie, C. J., L. J., in delivering judgment, said:²⁵

“I think that the discrepancy at first in the number and in the kind between the ammunition found and that described in the manifest created sufficient suspicion to warrant the arrest; but this suspicion, I think, has been satisfactorily cleared up by Captain Byers.

The suit will, therefore, be dismissed without costs.”

²³ Appendix, p. 77.

²⁴ Appendix, p. 77.

²⁵ Appendix, p. 131.

In this case the court attached no importance whatever to the hole in the skin found on board. The only question considered was the discrepancy between the ammunition produced and that described in the manifest. It was shown at the trial that the master had relied upon the count made by his hunters, and that they had been honestly mistaken as to the number and description of shells on board. There was wholly lacking the evidence of fraud which is so apparent in the case of the *Wanderer*, yet in this case it was held that the seizure, which was made by an American officer, was justifiable.

In the case of the *Aurora*, seized by the United States revenue cutter *Rush* on the 10th of August, 1896, for having on board sealskins containing holes apparently made by gunshot, the court likewise dismissed the vessel, but held, as in the case of the *E. B. Marvin*, that the arrest was justified, and added, "the burden of showing that firearms had not been used was imposed on the vessel."²⁶ In this case the owners of the vessel claimed damages by reason of the seizure, but their claim was disallowed.

Attention should likewise be called to the fact that at the time of the seizure of the *Wanderer* the "North Pacific Act, 1893,"²⁷ was still in force. This act contained the provision that if, during prohibited times and in prohibited waters, a British ship is found having on board thereof fishing and shooting implements or sealskins, it shall lie on the owner or master of such vessel to prove that the ship was not used or employed in contravention of the act.

That this provision of the act of 1893 was not rendered inoperative by the "Behring Sea Award Act, 1894," and that such provision applied equally to seizures made by American officers as to those made by British officers was established in the case of the *Shelby*, decided in 1895 by Davie, C. J., L. J.²⁸

²⁶ Appendix, p. 111.

²⁷ Appendix, p. 44.

²⁸ Appendix, p. 148.

This case arose out of the seizure of the *Shelby* by the United States revenue cutter *Corwin*, on the 11th of May, 1895, on the ground that she was found within the award area during the close season having on board sealskins and implements for taking seals. In delivering judgment in this case the court said:

“By section 1, sub-section 6, of the *Seal Fishery (North Pacific) Act*, 1893, which Act was in force at the time of the seizure, if, during prohibited times and in prohibited waters, a British ship is found having on board thereof fishing and shooting implements or seal skins, it shall lie on the owner or master of such vessel to prove that the ship was not used or employed in contravention of the Act. The Acts of 1893 and 1894 being *in pari materiâ* are to be read as one Act.

“The *Shelby*, therefore, having been found within prohibited waters with seals and implements for taking them on board is to be deemed to have been employed in contravention of the Act unless the contrary be shown.”

In view of this provision of the British law, if the *Wanderer* had been taken to trial as she should have been, the burden would have been upon the master to prove that the vessel had not been used in contravention of the act, and no liability would have attached to the officer making the seizure even though the vessel was released. There is wholly lacking in this case any evidence that the seizing officer acted otherwise than in good faith and in the belief that the *Wanderer* was guilty of an infraction of the British act.

Lord Salisbury, in his instruction of August 16, 1895, to the British Embassy at Washington, made this statement:

“A duly authorized officer of the United States is warranted in seizing a British vessel if he believes, or has reasonable ground for believing, that the British law has been violated.”²⁹

²⁹ Appendix, p. 104.

It is submitted that in the case of the *Wanderer* the seizing officer believed, and had reasonable grounds for believing, that the British law had been violated.

The United States, in connection with the fact of the good faith of its naval officer who seized and detained the *Wanderer*, cannot pass over without comment such expressions in the memorial of His Britannic Majesty's Government as that the seizure was "made for the purpose of preventing the *Wanderer* from engaging in sealing operations during the season," and "damages are therefore claimed by reason of the seizure for the successful purpose of preventing the *Wanderer* from engaging in a lawful pursuit of hunting for seals in a proper season and in proper waters."³⁰ Charges of so grave a nature against officers of the United States navy, which are made without evidence of any sort to support them, are unjustifiable imputations upon the integrity of such officers, which the United States is unwilling to believe His Majesty's Government will permit to remain as a part of the record in this case.

III. *The action of the naval authorities of Her Majesty in releasing the Wanderer was in direct violation of the diplomatic agreement between the two governments, and was not authorized by British law; His Majesty's Government are therefore estopped from asserting any liability on the part of the United States, since by their own wrongful act they rendered it impossible to determine in the only competent manner the illegality of the seizure.*

The Order in Council of 1894 conferring authority upon American officers to seize British vessels for contravention of the British act provides that vessels seized by American officers may be brought by such officers for adjudication

³⁰ Memorial, p. 12.

before any such British court of admiralty as is referred to in section 103 of the "Merchant Shipping Act, 1854," or that they may be delivered to any such British officer as is mentioned in the said section for the purpose of being dealt with pursuant to the Merchant Shipping Act.³¹

No authority is conferred upon British naval officers to review or pass upon seizures made by American officers; their authority and duty in the premises are confined solely to the bringing before the appropriate court for trial vessels delivered into their custody.

The contention of His Majesty's Government that the senior British naval officer, to whom the *Wanderer* was delivered, was justified in releasing the vessel for the reason that the declaration of the seizing officer did not set forth facts constituting a violation of British law is not sustained by the evidence in the case. The declaration of the seizing officer shows clearly that the seizure was made for a violation of the "Behring Sea Award Act, 1894."³² While it is true that the declaration is not so worded as to allege that the offense of hunting fur seals had been committed, there is nevertheless the direct charge that the vessel had been guilty of a contravention of the "Behring Sea Award Act, 1894," and the declaration contains a statement of the evidence upon which the officer relied to establish the fact of such contravention. It is immaterial that the seizing officer also charged that the President's proclamation of April 9, 1894, had been violated, so long as there was an allegation of an offense under the British act or evidence from which such an offense might be presumed.

The Canadian courts have repeatedly held that irregularities in the seizure of a vessel or in the declaration of seizure were not material so long as the proceedings before the court were regular.

In the case of the *Carlotta G. Cox*, seized in 1907 by the United States revenue cutter *Rush* on suspicion of having

³¹ Appendix, p. 79.

³² Appendix, p. 33.

contravened the Behring Sea Award Act, the point was raised that the seizing officer was not duly commissioned and instructed by the President for that purpose, and that the name of the vessel making the seizure had not been communicated to Her Majesty's Government. Upon this question the court held as follows:³³

“In my opinion, even assuming that the commander of the *Rush* was not ‘duly commissioned and instructed’ to seize the schooner, and even though the commander of the *Quadra* to whom she was first delivered is not an officer who can take proceedings against her under said section 103, yet seeing the fact is that she has been brought for adjudication before, and is now before this Court (and in the custody of its marshal) by and at the instance of an officer, Commander Allgood, R. N., who admittedly is within said section 103, and who claims her condemnation for contravention of the Behring Sea Award Act, it is not open to her owners to answer that charge (whatever other remedies they may have) by setting up irregularities in the manner in which she was originally seized or in the means whereby she was ultimately brought within the jurisdiction of this Court, and, later, before it by Commander Allgood who instructed the writ to be issued on the 29th of November, as appears by the indorsement thereof. According to the principle decided in *The Annandale* (1877), 2 P. D., 179, the forfeiture here accrued at the time the illegal act was done, and I am unable to agree that any of said antecedent irregularities can affect the admittedly regular proceedings in this Court.”

³³ Appendix, p. 116.

In the case of the *Shelby*, the declaration of the seizing officer alleged a violation of the President's proclamation, but, as the seizure was in fact made because of circumstances which gave reasonable grounds for believing that the British act had been violated, the form of the original declaration was held to be immaterial and the proper libel was filed by the British officers and the vessel was brought to trial.³⁴

The United States contends, however, that irrespective of whether the seizure of the *Wanderer* was justified, His Majesty's Government are estopped from asserting any liability on the part of the United States, even if such liability could arise from the act of an officer of the United States while enforcing a British law under a special authority, since the unauthorized act of the British naval officer at Victoria, B. C., in releasing the *Wanderer* rendered it impossible to determine in the only way possible under British law the question of the legality of the seizure. If the vessel had been brought to trial, this question would have been determined by a competent court, and the owners of the vessel would have had a perfect and complete remedy by asserting a counter-claim for damages on account of the alleged illegality of the seizure. If it had been determined by the court that the seizure was made without probable or justifiable cause, the court was empowered to make such order in the premises as the facts and circumstances of the case warranted.

The United States denies that in any circumstances the United States could be held liable to His Majesty's Government on account of the seizure of a British vessel by an American officer acting under and by virtue of the authority of the British Government; but it is manifest that, if in any circumstances the United States could be held liable, such liability would attach only after it had been determined by a court of competent jurisdiction that His Majesty's Government were liable for the seizure.

³⁴ Appendix, pp. 94, 148.

IV. *If the Wanderer had been brought to trial, and if the court had found that the seizure was illegal and without probable cause, Her Majesty would have been liable, and damages would have been assessed in favor of the owners.*

As set forth in the first section of this answer, the United States maintains that seizures by American officers under and by virtue of the authority conferred upon them by the Behring Sea Award Order in Council, 1894, were to all intents and purposes seizures by Her Majesty's Government. The authority under which the *Wanderer* was seized emanated from Her Majesty's Government, and not from the United States. It follows as a natural consequence that, if at the trial the court should have found that the owner of the vessel was entitled to damages, Her Majesty's Government would have been held liable.

This is clearly established by the case of the *Beatrice*, growing out of the seizure by the United States revenue cutter *Rush* in August, 1895. It was held in that case that there were no justifiable grounds for the seizure; and, the claim having been made by the owners for an allowance of damages, Her Majesty was held liable in the sum of \$3,163.50.³⁵

While the United States is confident that, if the case of the *Wanderer* had gone to trial, the court would have held that the seizure was justified, even though the charge against the vessel might have been dismissed, yet, if the court had found otherwise, any damages which might have been assessed in favor of the master or owner of the *Wanderer* would have been against Her Majesty's Government.

The authorities of Her late Majesty's Government fully recognized this fact, and understood that Her Majesty was liable for seizures made under and by virtue of the British Act and Order in Council. In his note of June 25, 1896, to the Secretary of State, the British Ambassador said:³⁶

³⁵ Appendix, p. 132.

³⁶ Appendix, p. 127.

“In existing circumstances Her Majesty’s Government are unable to consent to the United States Government being recognized in the trials in question as a party to the litigation with a *locus standi* before the Court; but the situation would be altered if the United States Government were to enter into an agreement to satisfy the judgment of the Court if the seizure should be held to be wrongful. They would then have an interest in the result of the case which would make it reasonable that they should in some form take an active part in the conduct of the proceedings.”

The fact that the owners of the *Wanderer* accepted the release of the vessel without prosecuting their claim for damages before the British courts, as they had a right to do, is sufficient in itself to justify the dismissal of this claim.

V. If the United States could be held liable for the seizure of the Wanderer, which is denied, His Majesty’s Government would still be liable for the detention of the Wanderer from and after July 1, 1894, the date when the vessel arrived at Unalaska, the subsequent detention of the vessel being due to the failure of the British naval authorities to send a vessel there to take charge of the Wanderer.

Upon the admitted facts of this case it is apparent that the long detention of the *Wanderer* was due to the failure of Her Majesty’s Government to send a vessel to Unalaska to receive the *Wanderer* from the custody of the seizing officer. It must be borne in mind that from May 1st to July 31st inclusive no seals could be legally taken in the North Pacific. It appears that from the time of the seizure of the *Wanderer* until the 2d of August, a period of more than a month, there was no British naval vessel at Unalaska or within those waters, though the commanding officer of the

American fleet had been informed that a vessel would be sent to Unalaska about the time the *Wanderer* arrived there.³⁷ Inasmuch as the *Wanderer* arrived at Unalaska by the 1st of July, a month prior to the beginning of the open season for sealing in the North Pacific, if there had been present a British vessel to whom she could have been delivered, the vessel could have been taken to Victoria and released in time to return to Bering Sea for the season beginning on the 1st of August if the British naval authorities had taken the course, which they finally did take in the case.³⁸ It is submitted, therefore, that the seizure of the *Wanderer* in itself, except for the undue delay of the British naval authorities in having a vessel at Unalaska, would have occasioned no loss or damage to the owner, charterer, master, or crew. It is denied, however, that the British authorities at Victoria, B. C., would, in any event, have been justified in releasing the *Wanderer* without trial, even though such release would have permitted her to return to the sealing grounds in time for the open season.

VI. *There is no basis in law or in fact for the measure of damages set forth in the memorial, and aside from any other consideration the claim should be disallowed for failure of proof of damages.*

Even if it could be established that the Government of the United States is liable in this case, there is no possible justification for the exaggerated claim for damages set forth in the memorial of His Britannic Majesty's Government. The United States assumes that the claim for damages as presented was made up by the private parties interested, and inadvertently allowed to remain in the memorial as filed without correction by His Majesty's Government. There is no basis in law or in fact for the item of \$9,060.86 for

³⁷ Appendix, p. 40.

³⁸ Appendix, pp. 40, 41.

prospective catch, nor is there any justification for the item amounting to \$8,200.00 for the unearned wages of the master and crew of the vessel. As exhibiting the gross exaggeration of the amount claimed for damages, it is only necessary to point out that, even if the sum claimed for probable catch were allowable, a proposition which the United States denies, no deduction is made in the memorial for wages or cost of supplies incurred in securing such catch, but, on the contrary, the wages for the open season in the Bering Sea and the cost of supplies for the homeward voyage are added to the claim for the value of the probable catch. In addition to this method of enlarging the damages claimed, a demand is made for seven per cent interest from November 4, 1894, regardless of the fact that by the terms of submission annexed to the Special Agreement of August 18, 1910, no more than four per cent can, in any event, be allowed.

There is likewise no basis in law or in fact for the claim for damages on account of the alleged injury to the seven shotguns by reason of the manner in which they were sealed. The guns were sealed at the instance and request of the master of the schooner and under the authority of Her Majesty's Government. No protest was made at the time of sealing as to the manner in which the guns were sealed, although the master was present and understood that the guns were to remain sealed until the close of the sealing season, approximately September 1st, since the use of firearms for sealing was prohibited at all times in Bering Sea. During the time the *Wanderer* was detained at Unalaska no protest was made to the authorities of the United States, and no request was made upon them to unseal the guns. Furthermore, the master himself could have unsealed the guns, since he had full charge and control of his vessel except as to her movements, and since his vessel having been seized and held in custody, there was no longer any reason for the guns remaining sealed.

For the foregoing reasons, and upon the grounds stated, the United States asks that the claim entitled “*The Wanderer*” be dismissed and finally barred.

ROBERT LANSING,
Agent of the United States.

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EXHIBIT 1.

Report of Lieutenant E. F. Leiper.

U. S. S. *Concord*,

ST. PAUL, KADIAK IS.,

June 10, 1894.

SIR:

1. I respectfully report that in obedience to your verbal order, I boarded on June 9, 1894, at about 4 p. m., the British sealing schooner *Wanderer*, of Victoria, B. C., registered No. 64139, Captain Henry Paxton.

2. At my request the master of the *Wanderer* produced all the ship's papers and also a warning against sealing in prescribed waters, which had been served on him on the morning of June 9, 1894, by the U. S. S. *Yorktown*. Also a license to proceed to Bering Sea to carry on sealing under the law issued by the U. S. S. *Yorktown*.

3. In the official log of the *Wanderer* there were two entries under date of June 9, 1894, over the signature of Lieutenant W. A. Gill, U. S. N., stating that in latitude 58 north, longitude 150 west, he had secured under seal the sealing outfit on board and that there were then on board 400 skins and no bodies of seals. Further, that he had delivered to the master a warning and the following papers: British Act, President's Proclamation, President's Regulations, and Navy Department's Instructions of May 4, 1894. Also, that he had that day placed under seal the following outfit on board in a box, 8,775 primers, 271 loaded shells, 74 empty shells, 370 lbs. of buckshot, 10 lbs. duckshot, in a keg, 20 lbs. of powder, in a bag, 7,300 wads, in a box, 11 spear heads, 7 shotguns.

4. I examined the seals on all these packages and finding them intact asked the master of the *Wanderer* if those

were all the guns and ammunition he had on board; and he replied that they were all.

5. I then had the skins counted and found 400 on board.

6. The mate of the *Wanderer* produced a small box in which I discovered two boxes of primers, 500 in all, and when I asked if they were all he had, he at first replied "Yes," and later he produced in addition a broken box. I then asked if he had any other implements on board, to which he replied that he had not, except some loading tools. This was in the presence of the Master.

7. I directed C. Carlsen (C. G. M.) to make a search of the vessel, and he and Henry Morley (C. S.) discovered in the extreme forward part of the vessel and between decks one breech-loading shotgun, No. 12 gauge bore, and a bag of loaded shell suitable to use in this gun. (I have since inspected 5 of these shell, selected at random, and find them to be loaded with buckshot.) There were 39 loaded shell in the bag. The gun and shells were secreted under a pile of iron cans and other articles and were unsealed.

8. While I was making an entry in the log book regarding these implements, the master of the *Wanderer* said to the mate, "God damn it, I told you you ought to have had that put in with the others," or words to that effect. This remark showed that he was aware of the presence on board of this gun and ammunition, when he told me that those sealed were all then on board, and later when the mate told me, in the presence of the Master, that he had nothing further than the primers and loading tools referred to. C. Carlsen and H. Morley were witnesses and hearers of these remarks, one or both.

9. I took possession of the gun and shells and reported verbally to you.

10. On the morning of June 10th, in the harbor of St. Paul, Kadiak, in obedience to your order, I informed the

Master of the *Wanderer* that you had determined to seize his vessel, and that you would assign reasons to him. I then brought him on board the U. S. S. *Concord*.

11. The unsealed gun of which I took possession was numbered 6642.

Very respectfully,

E. F. LEIPER,
Lieutenant, U. S. Navy.

THE CAPTAIN.

EXHIBIT 2.

Statement of Carl Carlsen (C. G. M.).

U. S. S. *Concord*,
ST. PAUL, KADIAK IS.,
June 10, 1894.

I went on board the *Wanderer* with Lieutenant E. F. Leiper, U. S. N., and while standing on the quarter-deck I saw the captain of the *Wanderer* giving him a bundle of guns which I saw was sealed. I stepped down into the cabin to see what kind of guns they were and found them to be shotguns. I saw Mr. Leiper counting these guns and he stated that there were seven and he asked if they were all the guns he had; to which the Captain of the *Wanderer* replied that they were all that were on board. After which I proceeded to count the sealskins on board the *Wanderer* as I was ordered by Lieutenant Leiper. I had two men from the boat's crew to help me, whose names were Henry Morley and Henry Rogers, and the Mate of the Schooner *Wanderer*; and I found 400 sealskins on board, which I reported to Mr. Leiper. Then after this was done Mr. Leiper asked if he might go around and see if I could find any nets, arms, or ammunition on board. I went into the

forecastle looking there with my lantern and I found people sleeping there in the bunks. I searched the bunks and I went forward to the eyes of the schooner where I found a number of iron cans and one section of stove-pipe. There I found a bag hidden away which contained 39 cartridges for a No. 12 bore shotgun which I handed to Henry Morley and he took it on deck and I looking finally around the cans found a shotgun No. 12 bore also hidden which I also handed to Henry Morley and he took it on deck, neither of them was sealed; after which I proceeded to Mr. Leiper and reported what I had found and left it to Mr. Leiper's action. Mr. Leiper asked the Mate, "How about that?" to which the Mate replied he had stowed them down there himself. The gun and ammunition were taken on board the *Concord* and given in charge of Commander Goodrich.

After examining the cartridges, I opened five cartridges and found them to be loaded with buckshot, ready for use.

CARL CARLSEN,
A. C. G. Mate, U. S. N.

EXHIBIT 3.

Statement of Henry Morley.

U. S. S. *Concord*,
ST. PAUL, KADIAK IS.,
June 10, 1894.

I was lying astern of the schooner, another man and myself. I was told to go below to count the sealskins with Mr. Carlsen. We went forward into the hold, and I then started to count the skins, and we found that there were 400. After that I went into the cabin with Mr. Carlsen, and he asked me to go forward with him to see if we could find any nets.

We looked in two of the boats, one inboard and one at the davits, and could not find any nets. We then went forward and looked around on the fore-castle. We then went below and found men in the bunks. I overhauled the upper bunk finding nothing. We then went forward on the port side in the eyes of her and found a bag of loaded shell. Mr. Carlsen handed them to me to take care of them. We then went on the starboard side in the eyes of her and found a shotgun in two pieces with a cloth around them. Mr. Carlsen handed them to me and told me to take it on deck. We both went on deck and I saw that they were not sealed. Mr. Leiper then came on deck from the cabin and Mr. Carlsen reported to him that he had found a shotgun and cartridges. Mr. Leiper said to the Mate, "How about this, Sir?" and remarked that it looked pretty bad. Then the Captain turned to the Mate, and asked him where the gun was. He said that it was forward. Then the Captain said, "Damn it! Why did you not put it with the rest of them?" Mr. Leiper told the Captain to keep her hove to, and we then left the schooner.

HENRY MORLEY,
Ordinary Seaman.

EXHIBIT 4.

Report of Commander Goodrich.

U. S. S. *Concord*,
UNALASKA, *June 16, 1894.*

SIR:

I have the honor to report that on June 9, in latitude 58° 21' N., longitude 150° 22' W., I boarded the sealing schooner *Wanderer*, bound to St. Paul, Kadiak. Although previously warned and her arms (ostensibly all) sealed, the boarding officer found, concealed on board arms and ammunition suitable to the killing of fur seals.

2. The sea being rough, I towed the *Wanderer* into St. Paul and the next day I formally seized her, put an officer and three men on board, and directed the Master to proceed to Unalaska.

3. My action is based on the last half of Sec. 10 of the Act of Congress April 6; the next to the last sentence in the "Regulations Governing Vessels, etc.;" the Bering Sea Award Act, and Pars. 1 and 3 of your confidential instructions of May 13th.

4. Copies are enclosed of my declaration of seizure (1),^a my letter to the Master of the *Wanderer* (2)^b and to Ensign Twining (3)^c of the Master's protest (4),^d and my comments thereon (5),^e and of statements of the boarding officer, Lieut. E. F. Leiper (6),^f and of two enlisted men (7 and 8)^g who aided in the search.

Very respectfully,

C. F. GOODRICH,

Commander, U. S. Navy, Commanding.

THE COMMANDER

of the U. S. Naval Force
in Bering Sea.

EXHIBIT 5.

Order of Commander Goodrich.

Whereas the British sealing schooner *Wanderer* of Victoria, B. C., No. 64139, was duly warned by the U. S. S. *Yorktown* on June 9, 1894, of the provisions of the Bering Sea Award Act, 1894; and whereas her Master was furnished with copies of that Act, of the Proclamation of the President of the United States, dated April 9, 1894, and of his Regulations governing vessels employed in fur sealing and of the orders of the United States Secretary of the Navy to the Commander of the United States Naval Forces in Bering Sea; and whereas on being so warned by the

Commander of the U. S. S. *Yorktown*, the Master of the *Wanderer* did produce certain arms and ammunition to be sealed, which arms and ammunition he certified to be all belonging to that vessel or to any person attached to her, and that there was none away in boats, and whereas the arms and ammunition so produced were duly sealed by the U. S. S. *Yorktown*, and in consideration of this certificate on the part of the Master of the *Wanderer* and of his application, he was granted a license to proceed to Bering Sea to continue sealing lawfully; and whereas subsequent to the warning and certificate aforesaid arms and ammunition suitable to the killing of fur seals were discovered concealed on board said *Wanderer* by an officer from the U. S. S. *Concord* after the said Master had again stated that there were none such unsealed on board, he well knowing that there were such unsealed arms and ammunition on board; and whereas the possession of such unsealed arms and ammunition was in contravention of the Bering Sea Award Act, 1894, Clause I, par. 2, and Clause III, par. 2, as well as of Section 10 in the President's Proclamation aforesaid, the Schooner *Wanderer* is hereby ordered to proceed to Unalaska to be there handed over to the Senior British Naval Officer present in accordance with Clause III, par. 3, of the Bering Sea Award Act, 1894.

2. The condition of the *Wanderer* is good.

3. The *Wanderer* was searched by the U. S. S. *Concord* at about 4 p. m., June 9, 1894, in latitude $58^{\circ} 21'$ north, and longitude $150^{\circ} 22'$ west, and was then towed into the harbor of St. Paul, Kadiak Island, where she was formally seized as above stated on June 10, 1894, by the U. S. S. *Concord*.

4. Enclosed herewith are a list of the *Wanderer's* papers seized and the statement of the officer who made the search, also the statement of two men.

C. F. GOODRICH,

Commander, U. S. Navy,

Commanding the U. S. S. *Concord*.

June 10, 1894.

EXHIBIT 6.

Commander Goodrich to Master of Wanderer.

TO CAPTAIN HENRY PAXTON,

Sealing Schooner Wanderer:

Whereas your vessel was duly warned by the U. S. S. *Yorktown*, on June 9, 1894, of the provisions of the Bering Sea Award Act, 1894; and whereas you were furnished with copies of that Act, of the Proclamation of the President of the United States, dated April 9, 1894, of the President's Regulations governing vessels employed in fur sealing, and of the orders of the United States Secretary of the Navy to the Commander of the United States Naval Force in Bering Sea; and whereas firearms and ammunition suitable to the killing of fur seals were, subsequent to the above warning, found concealed on board of your vessel, after the arms and ammunition which you had declared to be all that were on board had been officially sealed by the U. S. S. *Yorktown*; and whereas in thus having concealed arms and ammunition on board, you were acting in contravention of Clause I, par. 2, and of Clause III, par 2, of the Bering Sea Award Act, 1894, as well as of Section X in the President's Proclamation, it becomes my duty to direct you to proceed with the vessel under your command and all persons borne on your shipping articles, to Unalaska, there to be turned over to the Senior British Naval Officer Present for such action as he deems fit.

2. Ensign N. C. Twining and three men will be placed on board your vessel to see that you carry out these instructions without undue delay.

3. You are distinctly informed that your authority and responsibilities as Master are in no wise affected or

abridged, except in so far that your movements are confined to the passage from this port to Unalaska and that you are ordered to retain all your crew on board until your arrival there. In other words, you remain in complete command of your ship, and the duty of obedience by your crew to your lawful orders remains in the same force as heretofore.

4. Should a British Man-of-War be encountered en route, her Commanding Officer will be requested to assume charge of the *Wanderer*.

5. Ensign Twining will be glad to render you any reasonable assistance in his power on the passage if you so desire.

6. You hold my receipt for certain documents which I have found it necessary to withdraw from your custody.

C. F. GOODRICH,

Commander, U. S. Navy, Commanding.

EXHIBIT 7.

Protest of Master of Wanderer.

C. F. GOODRICH,

Commander of U. S. Navy,

Commanding U. S. S. *Concord*;

I, Henry Paxton, Master of Schooner *Wanderer*, hereby protest against the seizure of said vessel by U. S. S. *Concord* on the following grounds:

1. Having been searched and overhauled and afterwards licensed to proceed on the voyage by the U. S. S. *Yorktown* at 8.30 a. m., on June the 9th, 1894.

2. Within seven hours of departure of said U. S. S. *Yorktown* boarded and searched again by U. S. S. *Concord*

being on my way to St. Paul, Kadiak, at the time, and being found with one gun and thirty-nine shells, which had been hidden by the mate without my orders or knowledge. Said gun and ammunition being the mate's private property.

3. Being in constant attendance on the officer of the U. S. S. *Yorktown*, could only give orders to the mate in regard to matters concerning guns, ammunition, seals skins, etc., expecting him to obey my orders, and having been on my feet for 36 hours, felt unable, after the officer of the U. S. S. *Yorktown* had left, to overhaul the vessel, and anyhow had full confidence in the mate, that he would obey my orders.

4. At the time of boarding by the U. S. S. *Concord*, the vessel was beating to windward under all possible canvas for St. Paul, Kd., I told the officer that I would like, if possible, to get a tow if the ship was bound that way. He replied he did not know where the ship was bound. After the search being over, a rope was passed to the Schooner, with the words to make the rope fast, and the steamer would tow us to St. Paul.

5. The word seizure never mentioned, nor any papers being confiscated, or any officer sent on board, our position being about fifty-three miles from St. Paul, where we arrived the following forenoon.

6. According to Clause III of the instructions issued by the Navy Department, the seizure I consider to be illegal, also by towing the Schooner into American waters from the open sea and then making the seizure.

7. Having arrived in St. Paul, Kd., was told to cast adrift the tow line, and when I made sail to get into safe anchorage in the inner harbor a boat came alongside and told me that my schooner was seized, against which I now protest.

H. PAXTON,
Master, Sch. Wanderer.

EXHIBIT 8.

Order to Ensign Twining.

U. S. S. *Concord*,

ST. PAUL, KADIAK IS.,

June 10, 1894.

SIR:

1. You are hereby placed on board the seized British Schooner *Wanderer* to see that she proceeds without delay to Unalaska where you will hand her over to the Senior British Naval Officer Present, taking his receipt therefor with that of all enclosed papers.

2. You will have under your command an armed force of three enlisted men, rationed for one month.

3. You will not interfere with the duties of the Master unless it becomes evident to you that he purposes escape or unreasonable delay. But you will give him such aid as he may desire and you can properly render.

4. On reaching Unalaska you will at once communicate with the Senior United States Naval Officer Present, if there be one, and show him these orders.

5. If there be no British ship in port, you will hold the *Wanderer* until one arrives.

6. Should you fall in with a British Man-of-War en route, you will request her Commanding Officer to relieve you of the charge of the *Wanderer*, and to land you either at Unalaska or some other port where you may obtain transportation to that point.

7. When free of the *Wanderer* await the *Concord's* arrival at Unalaska.

C. F. GOODRICH,

Commander, U. S. Navy, Commanding.

ENSIGN N. C. TWINING,

U. S. Navy.

EXHIBIT 9.

Report of Commander of United States Naval Forces.

U. S. S. *Mohican* (Third Rate),

SITKA, ALASKA, *June 13, 1894.*

SIR:

I have the honor to report to the Department that the commanding officer of U. S. S. *Pheasant* informs me that he has been ordered to Esquimaux for stores, but that a British vessel will be sent to Unalaska immediately, calling at Sitka and St. Paul on the way.

When the *Pheasant* leaves there will be no British vessel in or near the Bering Sea, unless one has been sent from the Asiatic Station.

Very respectfully,

C. E. CLARK,

Commander, U. S. N.,

Commanding United States Naval Forces in Bering Sea.

THE SECRETARY OF THE NAVY,

Washington, D. C.

EXHIBIT 10.

*Commander Goodrich to British Senior Naval Officer at
Unalaska.*

U. S. S. *Concord*,

AT SEA, *June 16, 1894.*

THE BRITISH SENIOR NAVAL OFFICER,

Unalaska.

DEAR SIR:

1. I have the honor to enclose a copy of the protest of Henry Paxton, Master of the Schooner *Wanderer*, and to submit the following comments:

1st. By the statement of the boarding officer it appears that the master was aware of the existence of the implicating articles, yet in his certificate and application for license he distinctly affirms that the arms presented to be sealed were all on board. His responsibility for the accuracy of his certificate is complete.

2nd. The Schooner had a leg-of-mutton main trysail set at the time of boarding, indeed, the same canvas as she generally used in "dodging about for seals."

3rd. The tow to St. Paul's would have been helpful if not followed by seizure. By Section 520 of the Merchant Shipping Act it would appear that the place of seizure is immaterial.

4th. I shall be glad to assist you in such further steps which you may deem proper to make.

Very respectfully,

C. F. GOODRICH,
Commander, U. S. Navy, Commanding.

EXHIBIT 11.

Report of Commander of United States Naval Forces.

No. 181.

U. S. S. *Mohican* (3d Rate),

DUTCH HARBOR, ALASKA,

July 27, 1894.

SIR:

1. I have the honor to call the Department's attention to the fact that no British Cruiser has been at Unalaska this year and to the complications that have already arisen in consequence.

2. The British Schooner *Wanderer*, whose seizure by the *Concord* was reported in my letter dated July 2, has been

detained at Unalaska for nearly a month in the expectation that a British Naval vessel might arrive any day, and this expectation was not based simply upon the accepted understanding that British cruisers were to assist in the patrol, but upon the assurance of the Commanding Officer of H. M. S. *Pheasant*, who, as stated in my letter dated June 13, informed me when he left Sitka, that a vessel would be sent immediately to Unalaska calling at Sitka and St. Paul on the way. About the middle of July it was reported to me that the *Pheasant* had been seen at Portage Bay, near St. Paul, but some other vessel must have been mistaken for her.

3. The Master of the *Wanderer* having reported that his provisions were exhausted and that he could not get any on credit because his vessel had been seized and the report having been confirmed by the officer put in charge of the vessel, who, at my order, interviewed the different dealers here, I have ordered the Paymaster of this vessel to issue rations for fourteen persons, the number on board the *Wanderer*, until a British Naval vessel arrives, or until instructions have been received from the Department ordering her release or directing that she be sent to Victoria with witnesses, etc.

4. If the *Wanderer* is not condemned, the responsibility of the British Government for damages that may be adjudged beyond those resulting from her seizure and detention up to the time when she reached Unalaska (where we had every right to expect the presence of a British Cruiser), seems clear enough and it could be justly held that this responsibility attaches to the loss that our Government has been put to in supplying the *Wanderer's* crew with rations.

5. Should a British Cruiser arrive today, it would be too late to send the *Wanderer* to Victoria in time for a return to Bering Sea, in case of her release by the Court, as a vessel

would have to reach the Sea early in August to warrant sealing successfully, there being few days after that month when the boats used by hunters could be safely lowered. The Master of the *Wanderer* has asked if there were any chance of his being released by a British Navy Officer, and while I have given him no encouragement to look for such action, it is evident that this contingency is the only one that gives him any hope of being able to engage in sealing this year.

Copies of all the papers relating to the case are enclosed, giving the names of the officers and men concerned in the seizure. The Department can therefore designate the witnesses who are to be sent in the *Wanderer* if she is to go to Victoria, and also decide whether they are to be detached from the *Concord* or not, and the vacancies filled by detail from the vessels that are to remain on this side.

7. It will be seen that Section 4 of the British Act applies exactly to this case.

Very respectfully,

C. E. CLARK,

Commander, U. S. N.,

Commanding U. S. Naval Forces in Bering Sea.

THE SECRETARY OF THE NAVY.

EXHIBIT 12.

Report of Commander of United States Naval Forces.

No. 184.

U. S. S. *Mohican* (3d Rate),

DUTCH HARBOR, ALASKA,

August 5, 1894.

SIR:

With reference to my letter No. 181, dated July 27, in which attention was called to the fact that no British

Cruiser had been at Unalaska this year, I have the honor to inform the Department that H. M. S. *Pheasant* arrived here at 10 p. m. on the 1st of August, that the schooner *Wanderer* was delivered to her Commanding Officer the next day, and that the latter vessel will sail for Victoria on or about the 6th instant.

Very respectfully,

C. E. CLARK,

Commander, U. S. Navy,

Commanding U. S. Naval Forces in Bering Sea.

THE SECRETARY OF THE NAVY.

EXHIBIT 13.

Report of Commander of United States Naval Forces.

No. 189.

U. S. S. *Mohican* (3rd Rate),

DUTCH HARBOR, ALASKA,

August 5, 1894.

SIR:

I have the honor to inform the Department that Henry Paxton, Master of the Schooner *Wanderer* seized by the *Concord* June 10, 1894, after having been furnished with provisions from this vessel (valued at \$21.95) upon his representation that his own were exhausted and that he could not procure any because his vessel had been seized, which statement was verified by Naval Cadet A. M. Proctor, who at my order visited the various trading companies, refused to sign the Bills of Exchange drawn against Simon Leiser, Lessee, Victoria, B. C., although he had agreed to do so. He has, however, signed receipts for the provisions.

2. This action on the part of the Master should dispose of any question as to the correctness of his assertions that

he had no knowledge of the shotgun and ammunition that were found by the boarding officer of the *Concord*.

3. The *Wanderer* was delivered to the Commanding Officer of H. M. S. *Pheasant* August 2, and will sail for Victoria about August 6th.

4. A copy of this letter has been forwarded to the U. S. Consul at Victoria, B. C.

Very respectfully,

C. E. CLARK,

Commander, U. S. Navy,

Commanding U. S. Naval Forces in Bering Sea.

THE HONORABLE SECRETARY OF THE NAVY,

Washington, D. C.

EXHIBIT 14.

Report of United States Consul at Victoria.

No. 30.

CONSULATE OF THE UNITED STATES,

VICTORIA, B. C., *May 13, 1895.*

HONORABLE EDWIN F. UHL,

Assistant Secretary of State,

Washington, D. C.

SIR:

In reply to your dispatch No. 19 of the 4th instant, received today, enclosing copy of letter from the Treasury Department requesting information with respect to the final disposition of the Sealing Schooner, *Wanderer*, seized during the Sealing Season 1894, I beg leave to inform the Department that the said Schooner was released by the Commander-in-Chief of the Pacific Station, Admiral Stephenson, of H. M. S. the *Royal Arthur*.

This Schooner was seized by the U. S. S. *Concord* by reason of the fact that one unsealed gun was found in one of her berths.

She was turned over to H. M. S. *Pheasant* and brought to this port. Upon investigation, it was found that all her other guns, and her entire ammunition were sealed, and that her master was not aware and had no knowledge that there was a gun aboard unsealed in violation of the provisions of the Paris award.

Collector A. R. Milne, of this port and from whom I get this information, advises me that his Government at Ottawa instructed him to take no official action whatever in the matter, and that the Commander-in-Chief of this station, after careful investigation, and acting under legal advice, ordered the release of the Schooner, the conclusion having been reached that no case could be made out against her.

I am, Sir,

Very respectfully,

Your obedient servant,

W. P. ROBERTS,

U. S. Consul.

EXHIBIT 15.

Seal Fishery (North Pacific) Act, 1893. (56 Vict., Chap. 23.)

CHAPTER 23.—An act to provide for prohibiting the catching of seals at certain periods in Behring's Sea and other parts of the Pacific Ocean adjacent to Behring's Sea. (June 29, 1893.)

Whereas it is expedient to extend the seal fishery (Behring's Sea) act, 1891, to other waters of the North Pacific Ocean adjacent to Behring's Sea, and for that purpose to repeal and reenact that act:

Be it therefore enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

1. (1) Her Majesty, the Queen, may, by order in council, prohibit during the period specified by the order, the catching of seals by British ships in such parts of the seas to which this act applies as are specified by the order.

(2) While an order in council under this act is in force—

(a) A person belonging to a British ship shall not kill, take, or hunt, or attempt to kill or take, any seal during the period and within the seas specified by the order; and

(b) A British ship shall not, nor shall any of the equipment or crew thereof, be used or employed in such killing, taking, hunting, or attempt.

(3) If there is any contravention of this act, any person committing, procuring, aiding, or abetting such contravention shall be guilty of a misdemeanor within the meaning of the merchant shipping act, 1854, and the ship and her equipment, and everything on board thereof, shall be forfeited to Her Majesty as if an offence had been committed under section one hundred and three of the said act, and the provisions of sections one hundred and three and one hundred and four, and part ten of the said act, and of section thirty-four of the merchant shipping act, 1876 (which are set out in the schedule to this act), shall apply as if they were herein reenacted and in terms made applicable to an offence and forfeiture under this act, and any commissioned officer on full pay in the naval service of Her Majesty the Queen may seize the ship's certificate of registry.

(4) Any commissioned officer on full pay in the naval service of Her Majesty the Queen shall have power, during the period and in the seas specified by the order, to stop

and examine any British ship, and to detain her, or any portion of her equipment, or any of her crew, if in his judgment the ship is being or is preparing to be used or employed in contravention of this section.

(5) For carrying into effect an arrangement with any foreign State, an order in council under this act may provide that such officers of that State as are specified in the order may exercise the like powers under this act as may be exercised by such a commissioned officer as aforesaid in relation to a British ship, and the equipment and crew and certificate thereof, and that such British officers as are specified in the order may exercise, with the necessary modifications, the powers conferred by this act in relation to a ship of the said foreign State, and the equipment and crew and papers thereof.

(6) If during the period and within the seas specified by the order a British ship is found having on board thereof fishing or shooting implements or seal skins or bodies of seals, it shall lie on the owner or master of such ship to prove that the ship was not used or employed in contravention of this act.

2. (1) Where an officer has power under this act to seize a ship's certificate of registry, he may either retain the certificate and give a provisional certificate in lieu thereof, or return the certificate with an indorsement of the grounds on which it was seized, and in either case may direct the ship, by an addition to the provisional certificate or to the indorsement, to proceed forthwith to a specified port, being a port where there is a British court having authority to adjudicate in the matter, and if this direction is not complied with the owner and master of the ship shall, without prejudice to any other liability, each be liable to a fine not exceeding one hundred pounds.

(2) Where in pursuance of this section a provisional certificate is given to a ship or the ship's certificate is indorsed,

any British officer of customs or British consular officer may detain the ship until satisfactory security is given for her appearance in any legal proceedings which may be taken against her in pursuance of this act.

3. (1) A statement in writing, purporting to be signed by an officer having power in pursuance of this act to stop and examine a ship, as to the circumstances under which or grounds on which he stopped and examined the ship, shall be admissible in any proceedings, civil or criminal, as evidence of the facts or matters therein stated.

(2) If evidence contained in any such statement was taken on oath in the presence of the person charged in the evidence, and that person had an opportunity of cross-examining the person giving the evidence and of making his reply to the evidence, the officer making the statement may certify that the evidence was so taken and that there was such opportunity, as aforesaid.

4. (1) Her Majesty the Queen, in council, may make, revoke, and alter orders for the purpose of this act, and every such order shall be forthwith laid before both Houses of Parliament and published in the London Gazette.

(2) Any such order may contain any limitations, conditions, qualifications, and exceptions which appear to Her Majesty in council expedient for carrying into effect the object of this act.

5. (1) This act shall apply to the animal known as the fur seal, and to any marine animal specified in that behalf by an order in council under this act, and the expression "seal" in this act shall be construed accordingly.

(2) This act shall apply to the seas within that part of the Pacific Ocean known as Behring's Sea, and within such other parts of the Pacific Ocean as are north of the forty-second parallel of (north) latitude.

(3) The expression "equipment" in this act includes any boat, tackle, fishing or shooting instruments, and other things belonging to a ship.

(4) This act may be cited as the seal fishery (North Pacific) act, 1893.

(5) The seal fishery (Behring's Sea) act, 1891, is hereby repealed, but any order in council in force under that act shall continue as if it had been made in pursuance of this act.

(6) This act shall be and remain in force until the first day of July, 1895.

Under section 1 of the foregoing act an imperial order in council was passed.

EXHIBIT 16.

Award of the Tribunal of Arbitration Constituted under the Treaty Concluded at Washington, the 29th of February, 1892, Between the United States of America and Her Majesty the Queen of the United Kingdom of Great Britain and Ireland.

Whereas by a treaty between the United States of America and Great Britain, signed at Washington, February 29, 1892, the ratifications of which by the Governments of the two countries were exchanged at London on May 7, 1892, it was, amongst other things, agreed and concluded that the questions which had arisen between the Government of the United States of America and the Government of Her Britannic Majesty, concerning the jurisdictional rights of the United States in the waters of Bering Sea, and concerning also the preservation of the fur seal in or habitually resorting to the said sea, and the rights of the citizens and subjects of either country as regards the taking of fur seals in or habitually resorting to the said waters, should be submitted to a Tribunal of Arbitration to be composed of seven arbitrators, who should be appointed in the following manner, that is to say: two should be named by the President of the United States; two should be named by Her Britannic Majesty; His Excellency the President of

the French Republic should be jointly requested by the high contracting parties to name one; His Majesty the King of Italy should be so requested to name one; His Majesty the King of Sweden and Norway should be so requested to name one; the seven arbitrators to be so named should be jurists of distinguished reputation in their respective countries, and the selecting powers should be requested to choose, if possible, jurists who are acquainted with the English language;

And whereas it was further agreed by Article II of the said treaty that the arbitrators should meet at Paris within twenty days after the delivery of the counter cases mentioned in Article IV, and should proceed impartially and carefully to examine and decide the questions which had been or should be laid before them as in the said treaty provided on the part of the Governments of the United States and of Her Britannic Majesty respectively, and that all questions considered by the tribunal, including the final decision, should be determined by a majority of all the arbitrators;

And whereas by Article VI of the said treaty, it was further provided as follows:

In deciding the matter submitted to the said arbitrators, it is agreed that the following five points shall be submitted to them in order that their award shall embrace a distinct decision upon each of said five points, to wit:

1. What exclusive jurisdiction in the sea now known as the Bering Sea, and what exclusive rights in the seal fisheries therein, did Russia assert and exercise prior and up to the time of the cession of Alaska to the United States?

2. How far were these claims of jurisdiction as to the seal fisheries recognized and conceded by Great Britain?

3. Was the body of water now known as the Bering Sea included in the phrase, Pacific Ocean, as used in the treaty of 1825 between Great Britain and Russia; and what rights, if any, in the Bering Sea were held and exclusively exercised by Russia after said treaty?

4. Did not all the rights of Russia as to jurisdiction and as to the seal fisheries in Bering Sea east of the water boundary, in the treaty between the United States and Russia, of the 30th of March, 1867, pass unimpaired to the United States under that treaty?

5. Has the United States any right, and if so, what right of protection or property in the fur seals frequenting the islands of the United States in Bering Sea when such seals are found outside the ordinary three-mile limit?

And whereas, by Article VII of the said treaty, it was further agreed as follows:

If the determination of the foregoing questions as to the exclusive jurisdiction of the United States shall leave the subject in such position that the concurrence of Great Britain is necessary to the establishment of regulations for the proper protection and preservation of the fur seal in or habitually resorting to the Bering Sea, the arbitrators shall then determine what concurrent regulations, outside the jurisdictional limits of the respective Governments, are necessary, and over what waters such regulations should extend;

The high contracting parties furthermore agree to co-operate in securing the adhesion of other powers to such regulations;

And whereas, by Article VIII of the said treaty, after reciting that the high contracting parties had found themselves unable to agree upon a reference which should include the question of the liability of each for the injuries alleged to have been sustained by the other, or by its citizens, in connection with the claims presented and urged by it, and that "they were solicitous that this subordinate question should not interrupt or longer delay the submission and determination of the main questions," the high contracting parties agreed that "either of them might submit to the arbitrators any question of fact involved in said claims and ask for a finding thereon, the question of the liability of

either Government upon the facts found to be the subject of further negotiation;”

And whereas the President of the United States of America named the Hon. John M. Harlan, justice of the Supreme Court of the United States, and the Hon. John T. Morgan, Senator of the United States, to be two of the said arbitrators, and Her Britannic Majesty named the Right Hon. Lord Hannen and the Hon. Sir John Thompson, minister of justice and attorney-general for Canada, to be two of the said arbitrators, and His Excellency, the President of the French Republic, named the Baron de Courcel, senator, ambassador of France, to be one of the said arbitrators, and His Majesty, the King of Italy, named the Marquis Emilio Visconti Venosta, former minister of foreign affairs and senator of the Kingdom of Italy, to be one of the said arbitrators, and His Majesty, the King of Sweden and Norway, named Mr. Gregers Gram, minister of state, to be one of the said arbitrators;

And whereas we, the said arbitrators, so named and appointed, having taken upon ourselves the burden of the said arbitration, and having duly met at Paris, proceeded impartially and carefully to examine and decide all the questions submitted to us, the said arbitrators under the said treaty, or laid before us as provided in the said treaty on the part of the Governments of Her Britannic Majesty and the United States, respectively;

Now we, the said arbitrators, having impartially and carefully examined the said questions, do in like manner by this our award decide and determine the said questions in manner following, that is to say, we decide and determine as to the five points mentioned in Article VI as to which our award is to embrace a distinct decision upon each of them:

As to the first of the said five points, we, the said Baron de Courcel, Mr. Justice Harlan, Lord Hannen, Sir John Thompson, Marquis Visconti Venosta, and Mr. Gregers Gram, being a majority of the said arbitrators, do decide and determine as follows:

By the ukase of 1821, Russia claimed jurisdiction in the sea now known as the Bering's Sea to the extent of 100 Italian miles from the coasts and islands belonging to her, but, in the course of the negotiations which led to the conclusion of the treaties of 1824 with the United States and of 1825 with Great Britain, Russia admitted that her jurisdiction in the said sea should be restricted to the reach of cannon shot from shore, and it appears that, from that time up to the time of the cession of Alaska to the United States, Russia never asserted in fact or exercised any exclusive jurisdiction in Bering's Sea or any exclusive rights in the seal fisheries therein beyond the ordinary limit of territorial waters.

As to the second of the said five points, we, the said Baron de Courcel, Mr. Justice Harlan, Lord Hannen, Sir John Thompson, Marquis Visconti Venosta, and Mr. Gregers Gram, being a majority of the said arbitrators, do decide and determine that Great Britain did not recognize or concede any claim upon the part of Russia to exclusive jurisdiction as to the seal fisheries in Bering Sea outside of ordinary territorial waters.

As to the third of the said five points, as to so much thereof as requires us to decide whether the body of water now known as the Bering Sea was included in the phrase "Pacific Ocean" as used in the treaty of 1825 between Great Britain and Russia, we, the said arbitrators, do unanimously decide and determine that the body of water now known as the Bering Sea was included in the phrase "Pacific Ocean," as used in the said treaty.

And as to so much of the said third point as requires us to decide what rights, if any, in the Bering Sea were held and exclusively exercised by Russia after the said treaty of 1825, we, the said Baron de Courcel, Mr. Justice Harlan, Lord Hannen, Sir John Thompson, Marquis Visconti Venosta, and Mr. Gregers Gram, being a majority of the said arbitrators, do decide and determine that no exclusive rights of jurisdiction in Bering Sea and no exclusive rights as to the seal fisheries therein were held or exercised by Russia

outside of ordinary territorial waters after the treaty of 1825.

As to the fourth of the said five points, we, the said arbitrators, do unanimously decide and determine that all the rights of Russia as to jurisdiction and as to the seal fisheries in Bering Sea east of the water boundary, in the treaty between the United States and Russia of the 30th March, 1867, did pass unimpaired to the United States under the said treaty.

As to the fifth of the said five points, we, the said Baron de Courcel, Lord Hannen, Sir John Thompson, Marquis Visconti Venosta and Mr. Gregers Gram, being a majority of the said arbitrators, do decide and determine that the United States has not any right of protection or property in the fur seals frequenting the islands of the United States in Bering Sea, when such seals are found outside the ordinary three-mile limit.

And whereas the aforesaid determination of the foregoing questions as to the exclusive jurisdiction of the United States mentioned in Article VI leaves the subject in such a position that the concurrence of Great Britain is necessary to the establishment of regulations for the proper protection and preservation of the fur seal in or habitually resorting to the Bering Sea, the tribunal having decided by a majority as to each article of the following regulations, we, the said Baron de Courcel, Lord Hannen, Marquis Visconti Venosta, and Mr. Gregers Gram, assenting to the whole of the nine articles of the following regulations, and being a majority of the said arbitrators, do decide and determine in the mode provided by the treaty, that the following concurrent regulations outside the jurisdictional limits of the respective Governments are necessary and that they should extend over the waters hereinafter mentioned, that is to say:

ARTICLE 1.

The Governments of the United States and of Great Britain shall forbid their citizens and subjects respectively,

to kill, capture, or pursue at any time and in any manner whatever, the animals commonly called fur seals, within a zone of sixty miles around the Pribilof Islands, inclusive of the territorial waters.

The miles mentioned in the preceding paragraph are geographical miles of sixty to a degree of latitude.

ARTICLE 2.

The two Governments shall forbid their citizens and subjects, respectively, to kill, capture, or pursue, in any manner whatever, during the season extending, each year, from the 1st of May to the 31st of July, both inclusive, the fur seals on the high sea, in the part of the Pacific Ocean, inclusive of the Behring Sea, which is situated to the north of the 35th degree of north latitude, and eastward of the 180th degree of longitude from Greenwich till it strikes the water boundary described in article 1 of the treaty of 1867 between the United States and Russia, and following that line up to Behring Straits.

ARTICLE 3.

During the period of time and in the waters in which the fur-seal fishing is allowed, only sailing vessels shall be permitted to carry on or take part in fur-seal fishing operations. They will, however, be at liberty to avail themselves of the use of such canoes or undecked boats, propelled by paddles, oars, or sails, as are in common use as fishing boats.

ARTICLE 4.

Each sailing vessel authorized to fish for fur seals must be provided with a special license issued for that purpose by its Government and shall be required to carry a distinguishing flag, to be prescribed by its Government.

ARTICLE 5.

The masters of the vessels engaged in fur-seal fishing shall enter accurately in their official log book the date and place

of each fur-seal fishing operation, and also the number and sex of the seals captured upon each day. These entries shall be communicated by each of the two Governments to the other at the end of each fishing season.

ARTICLE 6.

The use of nets, firearms and explosives shall be forbidden in the fur-seal fishing. This restriction shall not apply to shotguns when such fishing takes place outside of Behring's Sea during the season when it may be lawfully carried on.

ARTICLE 7.

The two Governments shall take measures to control the fitness of the men authorized to engage in fur-seal fishing; these men shall have been proved fit to handle with sufficient skill the weapons by means of which this fishing may be carried on.

ARTICLE 8.

The regulations contained in the preceding articles shall not apply to Indians dwelling on the coasts of the territory of the United States or of Great Britain, and carrying on fur-seal fishing in canoes or undecked boats not transported by or used in connection with other vessels and propelled wholly by paddles, oars, or sails, and manned by not more than five persons each in the way hitherto practised by the Indians, provided such Indians are not in the employment of other persons, and provided that, when so hunting in canoes or undecked boats, they shall not hunt fur seals outside of territorial waters under contract for the delivery of the skins to any person.

This exemption shall not be construed to affect the municipal law of either country, nor shall it extend to the waters of Behring Sea or the waters of the Aleutian Passes.

Nothing herein contained is intended to interfere with the employment of Indians as hunters or otherwise in connection with fur-sealing vessels as heretofore.

ARTICLE 9.

The concurrent regulations hereby determined with a view to the protection and preservation of the fur seals shall remain in force until they have been, in whole or in part, abolished or modified by common agreement between the Governments of the United States and of Great Britain.

The said concurrent regulations shall be submitted every five years to a new examination, so as to enable both interested Governments to consider whether, in the light of past experience, there is occasion for any modification thereof.

And whereas the Government of Her Britannic Majesty did submit to the Tribunal of Arbitration by Article VIII of the said treaty certain questions of fact involved in the claims referred to in the said Article VIII, and did also submit to us, the said tribunal, a statement of the said facts, as follows, that is to say:

Findings of Fact Proposed by the Agent of Great Britain and Agreed to as Proved by the Agent for the United States, and Submitted to the Tribunal of Arbitration for its Consideration.

1. That the several searches and seizures, whether of ships or goods, and the several arrests of masters and crews, respectively mentioned in the schedule to the British case, pages 1 to 60, inclusive, were made by the authority of the United States Government. The questions as to the value of the said vessels or their contents, or either of them, and the question as to whether the vessels mentioned in the schedule to the British case, or any of them, were wholly or in part the actual property of citizens of the United States, have been withdrawn from and have not been considered by the tribunal, it being understood that it is open to the United States to raise these questions or any of them, if they think fit, in any future negotiations as to the liability of the United States Government to pay the amounts mentioned in the schedule to the British case;

2. That the seizures aforesaid, with the exception of the *Pathfinder* seized at Neah-Bay, were made in Bering Sea at the distances from shore mentioned in the schedule annexed hereto, marked C;

3. That the said several searches and seizures of vessels were made by public armed vessels of the United States, the commanders of which had, at the several times when they were made, from the Executive Department of the Government of the United States, instructions, a copy of one of which is annexed hereto, marked A, and that the others were, in all substantial respects, the same; that in all the instances in which proceedings were had in the district courts of the United States resulting in condemnation, such proceedings were begun by the filing of libels, a copy of one of which is annexed hereto, marked B, and that the libels in the other proceedings were in all substantial respects the same; that the alleged acts or offenses for which said several searches and seizures were made were in each case done or committed in Bering Sea at the distances from shore aforesaid; and that in each case in which sentence of condemnation was passed, except in those cases when the vessels were released after condemnation, the seizure was adopted by the Government of the United States; and in those cases in which the vessels were released the seizure was made by the authority of the United States; that the said fines and imprisonments were for alleged breaches of the municipal laws of the United States, which alleged breaches were wholly committed in Bering Sea at the distances from the shore aforesaid.

4. That the several orders mentioned in the schedule annexed hereto and marked C, warning vessels to leave or not to enter Bering Sea were made by public armed vessels of the United States, the commanders of which had, at the several times when they were given, like instructions as mentioned in finding 3, and that the vessels so warned were engaged in sealing or prosecuting voyages for that purpose,

and that such action was adopted by the Government of the United States.

5. That the district courts of the United States in which any proceedings were had or taken for the purpose of condemning any vessel seized as mentioned in the schedule to the case of Great Britain, pages 1 to 60, inclusive, had all the jurisdiction and powers of courts of admiralty, including the prize jurisdiction, but that in each case the sentence pronounced by the court was based upon the grounds set forth in the libel.

EXHIBIT 17.

Behring Sea Award Act, 1894.

CHAPTER 2.—An Act to provide for carrying into effect the award of the Tribunal of Arbitration constituted under a treaty between Her Majesty the Queen and the United States of America. (23rd April, 1894.)

Whereas by a treaty between Her Majesty the Queen and the Government of the United States of America various questions which had arisen respecting the taking and preservation of the fur seal in the North Pacific were referred to arbitrators as mentioned in the treaty:

And whereas the award of such arbitrators (in this act referred to as the Behring Sea Arbitration award), dated the fifteenth day of August, one thousand eight hundred and ninety-three, contained the provisions set out in the first schedule to this act; and it is expedient to provide for carrying the same into effect:

Be it therefore enacted, by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

1. (1) The provisions of the Behring Sea Arbitration Award set out in the first schedule to this act shall have effect as if those provisions (in this act referred to as the scheduled provisions) were enacted by this act, and the acts directed by articles one and two thereof to be forbidden were expressly forbidden by this act.

(2) If there is any contravention of this act, any person committing, procuring, aiding, or abetting such contravention shall be guilty of a misdemeanor within the meaning of the merchant shipping act, 1854, and the ship employed in such contravention and her equipment, and everything on board thereof, shall be liable to be forfeited to Her Majesty as if an offence had been committed under section one hundred and three of the said act; Provided, that the court, without prejudice to any other power may release the ship, equipment, or thing on payment of a fine not exceeding five hundred pounds.

(3) The provisions of the merchant shipping act, 1854, with respect to official logs (including the penal provisions) shall apply to every vessel engaged in fur seal fishing.

(4) Every person who forges or fraudulently alters any licence or other document issued for the purpose of article four or of article seven in the first schedule to this act, or who procures any such licence or document to be forged or fraudulently altered, or who knowing any such licence or document to be forged or fraudulently altered uses the same, or who aids in forging or fraudulently altering any such licence or document, shall be guilty of a misdemeanor within the meaning of the merchant shipping act, 1854.

(5) Subject to this act, the provisions of sections one hundred and three and one hundred and four and part ten of the merchant shipping act, 1854, and of section thirty-four of the merchant shipping act, 1876, which are set out in the second schedule to this act, shall apply as if they were herein reenacted, and in terms made applicable to an offence and forfeiture under this act; and any commissioned

officer on full pay in the naval service of Her Majesty the Queen may seize the ship's certificate of registry.

2. (1) Where an officer seizes, under this act, a ship's certificate of registry, he shall either retain the certificate and give a provisional certificate in lieu thereof, or return the certificate with an indorsement of the grounds on which it was seized, and in either case shall direct the ship, by an addition to the provisional certificate or to the indorsement, to proceed forthwith to a specified port, being a port where there is a British court having authority to adjudicate in the matter, and if this direction is not complied with, the owner and master of the ship shall, without prejudice to any other liability, each be liable to a fine not exceeding one hundred pounds.

(2) Where in pursuance of this section a provisional certificate is given to a ship, or the ship's certificate is indorsed, any officer of customs in Her Majesty's dominions or British consular officer may detain the ship until satisfactory security is given for her appearance in any legal proceedings which may be taken against her in pursuance of this act.

3. (1) Her Majesty the Queen in council may make, revoke, and alter orders for carrying into effect the scheduled provisions, and this act and every such order shall be forthwith laid before both houses of Parliament and published in the London Gazette, and shall have effect as if enacted in this act.

(2) If there is any contravention of any regulation made by any such order, any person committing, procuring, aiding, or abetting such contravention shall be liable to a penalty not exceeding one hundred pounds.

(3) An order in council under this act may provide that such officers of the United States of America as are specified in the order may, in respect of offences under this act, exercise the like powers under this act as may be exercised by a commissioned officer of Her Majesty in relation to a

British ship, and the equipment and certificate thereof, or such of those powers as appear to Her Majesty in council to be exercisable under the law of the United States of America against ships of the United States; and that such British officers as are specified in the order may exercise the powers conferred by this act, with any necessary modifications specified in the order, in relation to a ship of the United States of America, and the equipment and certificate thereof.

4. (1) Where any offence under this act has been committed by some person belonging to a ship, or by means of a ship, or the equipment of a ship, the master of the ship shall be deemed guilty of such offence, and the ship and her equipment shall be liable to forfeiture under this act;

(2) Provided that if it is proved that the master issued proper orders for the observance, and used due diligence to enforce the observance of this act, and the regulations in force thereunder, and that the offense in question was actually committed by some other person without his connivance, and that the actual offender has been convicted, or that he has taken all proper means in his power to prosecute such offender, if alive, to conviction, the master or the ship shall not be liable to any penalty or forfeiture other than such sum as will prevent any profit accruing by reason of the offense to the master or crew or owner of the ship.

5. The expression "equipment" in this act includes any boat, tackle, fishing or shooting instruments, and other things belonging to a ship.

6. This act may be cited as the Behring Sea award act, 1894.

7. (1) This act shall come into operation on the first day of May, one thousand eight hundred and ninety-four, provided that Her Majesty in Council, if at any time it appears expedient so to do, having regard to the circumstances which have then arisen in relation to the scheduled provis-

ions or to the enforcement thereof, may suspend the operation of this act or any part thereof during the period mentioned in the order, and the same shall be suspended accordingly.

(2) Where on any proceeding in any court against a person or ship in respect of any offense under this act it is proved that the ship sailed from its port of departure before the provisions of the award mentioned in the first schedule to this act were known there, and that such person or the master of the ship did not, after such sailing and before the alleged offence, become aware of those provisions, such persons shall be acquitted, and the ship shall be released and not forfeited.

8. This act shall remain in force so long as the scheduled provisions remain in force and no longer;

Provided, That if, by agreement between Her Majesty the Queen and the Government of the United States of America, the scheduled provisions are modified, then Her Majesty in Council may order that this act shall, subject to any modifications specified in the order, apply, and the same shall accordingly apply, to the modified provisions in like manner as if they were set out in the first schedule to this act.

SCHEDULES.

FIRST SCHEDULE.

Provisions in Award of the Tribunal of Arbitration Constituted under the Treaty Concluded at Washington on the 29th of February, 1892, between Her Majesty the Queen and the United States of America.

And whereas the aforesaid determination of the foregoing questions as to the exclusive jurisdiction of the United States mentioned in Article VI leaves the subject in such a position that the concurrence of Great Britain is necessary to the establishment of regulations for the proper protection

and preservation of the fur seal in or habitually resorting to the Behring Sea, the tribunal having decided by a majority as to each article of the following regulations, we the said Baron de Courcel, Lord Hannen, Marquis Visconti Venosta, and Mr. Gregers Gram, assenting to the whole of the nine articles of the following regulations, and being a majority of the said arbitrators, do decide and determine in the mode provided by the treaty that the following concurrent regulations outside the jurisdictional limits of the respective governments are necessary, and that they should extend over the waters hereinafter mentioned; that is to say:

ARTICLE 1. The Governments of the United States and of Great Britain shall forbid their citizens and subjects, respectively, to kill, capture, or pursue at any time and in any manner whatever the animals commonly called fur seals, within a zone of 60 miles around the Pribilof Islands, inclusive of the territorial waters.

The miles mentioned in the preceding paragraph are geographical miles, of 60 to a degree of latitude.

ARTICLE 2. The two Governments shall forbid their citizens and subjects, respectively, to kill, capture, or pursue, in any manner whatever, during the season extending each year from the 1st May to the 31st July, both inclusive, the fur seals on the high sea in the part of the Pacific Ocean, inclusive of the Behring Sea, which is situated to the north of the 35th degree of north latitude, and eastward of the 180th degree of longitude from Greenwich till it strikes the water boundary described in Article I of the treaty of 1867 between the United States and Russia, and following that line up to Behring Straits.

ARTICLE 3. During the period of time and in the waters in which the fur-seal fishing is allowed, only sailing vessels shall be permitted to carry on or take part in fur-seal fishing operations. They will, however, be at liberty to avail themselves of the use of such canoes or undecked boats, propelled by paddles, oars or sails, as are in common use as fishing boats.

ARTICLE 4. Each sailing vessel authorised to fish for fur seals must be provided with a special licence, issued for that purpose by its Government, and shall be required to carry a distinguishing flag to be prescribed by its Government.

ARTICLE 5. The masters of the vessels engaged in fur-seal fishing shall enter accurately in their official log book the date and place of each fur-seal fishing operation, and also the number and sex of the seals captured upon each day. These entries shall be communicated by each of the two Governments to the other at the end of each fishing season.

ARTICLE 6. The use of nets, firearms, and explosives shall be forbidden in the fur-seal fishing. This restriction shall not apply to shotguns when such fishing takes place outside of Behring's Sea during the season when it may be lawfully carried on.

ARTICLE 7. The two Governments shall take measures to control the fitness of the men authorised to engage in fur-seal fishing. These men shall have been proved fit to handle with sufficient skill the weapons by means of which this fishing may be carried on.

ARTICLE 8. The regulations contained in the preceding articles shall not apply to Indians dwelling on the coasts of the territory of the United States or of Great Britain, and carrying on fur-seal fishing in canoes or undecked boats, not transported by or used in connexion with other vessels, and propelled wholly by paddles, oars, or sails, and manned by not more than five persons each, in the way hitherto practiced by the Indians, provided such Indians are not in the employment of other persons, and provided that, when so hunting in canoes or undecked boats, they shall not hunt fur seals outside of territorial waters under contract for the delivery of the skins to any person.

This exemption shall not be construed to affect the municipal law of either country, nor shall it extend to the waters of Behring Sea or the waters of the Aleutian Passes.

Nothing herein contained is intended to interfere with the employment of Indians as hunters or otherwise in connection with fur-sealing vessels as heretofore.

ARTICLE 9. The concurrent regulations hereby determined, with a view to the protection and preservation of the fur seals shall remain in force until they have been, in whole or in part, abolished or modified by common agreement between the Governments of the United States and of Great Britain.

The said concurrent regulations shall be submitted every five years to a new examination, so as to enable both interested Governments to consider whether, in the light of past experience, there is occasion for any modification thereof.

SECOND SCHEDULE.

Enactments of merchant shipping act (17 and 18 Vict., c. 104) applied.

SECTION 103. * * * And in order that the above provisions as to forfeitures may be carried into effect, it shall be lawful for any commissioned officer on full pay in the military or naval service of Her Majesty, or any British officer of customs, or any British consular officer, to seize and detain any ship which has, either wholly or as to any share therein, become subject to forfeiture as aforesaid, and to bring her for adjudication before the high court of admiralty in England or Ireland, or any court having admiralty jurisdiction in Her Majesty's dominions; and such court may thereupon make such order in the case as it may think fit, and may award to the officer bringing in the same for adjudication such portion of the proceeds of the sale of any forfeited ship or share as it may think right.

SECTION 104. No such officer as aforesaid shall be responsible, either civilly or criminally, to any person whomsoever, in respect of the seizure or detention of any ship that has been seized or detained by him in pursuance of the provis-

ions herein contained, notwithstanding that such ship is not brought in for adjudication, or, if so brought in, is declared not to be liable to forfeiture, if it is shown to the satisfaction of the judge or court before whom any trial relating to such ship or such seizure or detention is held that there were reasonable grounds for such seizure or detention; but if no such grounds are shown, such judge or court may award payment of costs and damages to any party aggrieved, and make such other order in the premises as it thinks just.

PART X.—LEGAL PROCEDURE.

Application.

SECTION 517. The tenth part of this act shall, in all cases where no particular country is mentioned, apply to the whole of Her Majesty's dominions.

Legal procedure (general).

SECTION 518. In all places within Her Majesty's dominions, except Scotland, the offences hereinafter mentioned shall be punished and penalties recovered in manner following (that is to say):

(1) Every offence by this act declared to be a misdemeanor shall be punishable by fine or imprisonment, with or without hard labour, and the court before which such offence is tried may, in England, make the same allowances and order payment of the same costs and expenses as if such misdemeanor had been enumerated in the act passed in the seventh year of His late Majesty King George the Fourth, chapter sixty-four, or any other act that may be passed for the like purpose, and may, in any other part of Her Majesty's dominions, make such allowances and order payment of such costs and expenses (if any) as are payable or allowable upon the trial of any misdemeanor under any existing act or ordinance or as may be payable or allowable under any act or law for the time being in force therein:

(2) Every offence declared by this act to be a misdemeanor shall also be deemed to be an offence hereby made punishable by imprisonment for any period not exceeding six months, with or without hard labour, or by a penalty not exceeding one hundred pounds, and may be prosecuted accordingly in a summary manner instead of being prosecuted as a misdemeanor:

(3) Every offence hereby made punishable by imprisonment for any period not exceeding six months, with or without hard labour, or by any penalty not exceeding one hundred pounds, shall, in England and Ireland, be prosecuted summarily before any two or more justices, as to England in the manner directed by the act of the eleventh and twelfth years of the reign of Her Majesty Queen Victoria, chapter forty-three, and as to Ireland in the manner directed by the act of the fourteenth and fifteenth years of the reign of Her Majesty Queen Victoria, chapter ninety-three, or in such other manner as may be directed by any act or acts that may be passed for like purposes. And all provisions contained in the said acts shall be applicable to such prosecutions in the same manner as if the offences in respect of which the same are instituted were hereby stated to be offences in respect of which two or more justices have power to convict summarily or to make a summary order.

(4) In all cases of summary convictions in England, where the sum adjudged to be paid exceeds five pounds, or the period of imprisonment adjudged exceeds one month, any person who thinks himself aggrieved by such conviction may appeal to the next court of general or quarter sessions.

(5) All offences under this act shall, in any British possession, be punishable in any court or by any justice of the peace or magistrate in which or by whom offences of like character are ordinarily punishable or in such other manner, or by such other courts, justices, or magistrates as may from time to time be determined by any act or ordinance duly made in such possession in such manner as acts and

ordinances in such possession are required to be made in order to have the force of law.

SECTION 519. Any stipendiary magistrate shall have full power to do alone whatever two justices of the peace are by this act authorized to do.

SECTION 520. For the purpose of giving jurisdiction under this act, every offence shall be deemed to have been committed, and every cause of complaint to have arisen, either in the place in which the same actually was committed or arose, or in any place in which the offender or person complained against may be.

SECTION 521. In all cases where any district within which any court or justice of the peace or other magistrate has jurisdiction, either under this act or under any other act or at common law, for any purpose whatever, is situate on the coast of any sea, or abutting on or projecting into any bay, channel, lake, river, or other navigable water, every such court, justice of the peace, or magistrate shall have jurisdiction over any ship or boat being on or lying or passing off such coast, or being in or near such bay, channel, lake, river, or navigable water as aforesaid, and over all persons on board such ship or boat or for the time being belonging thereto, in the same manner as if such ship, boat, or persons were within the limits of the original jurisdiction of such court, justice, or magistrate.

SECTION 522. Service of any summons or other matter in any legal proceeding under this act shall be good service, if made personally on the person to be served, or at his last place of abode, or if made by leaving such summons for him on board any ship to which he may belong with the person being or appearing to be in command or charge of such ship.

SECTION 523. In all cases where any court, justice, or justices of the peace, or other magistrate, has or have power to make an order directing payment to be made of any seaman's wages, penalties, or other sums of money, then, if the

party so directed to pay the same is the master or owner of a ship, and the same is not paid at the time and in manner prescribed in the order, the court, justice, or justices, or other magistrate, who made the order, may, in addition to any other powers they or he may have for the purpose of compelling payment, direct the amount remaining unpaid to be levied by distress or poinding and sale of the said ship, her tackle, furniture, and apparel.

SECTION 524. Any court, justice, or magistrate imposing any penalty under this act, for which no specific application is herein provided, may, if it or he thinks fit, direct the whole or any part thereof to be applied in compensating any person for any wrong or damage which he may have sustained by the act or default in respect of which such penalty is imposed, or to be applied in or towards payment of the expenses of the proceedings; and, subject to such directions or specific application as aforesaid, all penalties recovered in the United Kingdom shall be paid into the receipt of Her Majesty's exchequer in such manner as the treasury may direct, and shall be carried to and form part of the consolidated fund of the United Kingdom; and all penalties recovered in any British possession shall be paid over into the public treasury of such possession, and form part of the public revenue thereof.

SECTION 525. The time for instituting summary proceedings under this act shall be limited as follows (that is to say):

(1) No conviction for any offense shall be made under this act in any summary proceeding instituted in the United Kingdom, unless such proceeding is commenced within six months after the commission of the offence; or, if both or either of the parties to such proceeding happen during such time to be out of the United Kingdom, unless the same is commenced within two months after they both first happen to arrive or to be at one time within the same;

(2) No conviction for any offence shall be made under this act in any proceeding instituted in any British possession, unless such proceeding is commenced within six months after the commission of the offence; or, if both or either of the parties to the proceeding happen during such time not to be within the jurisdiction of any court capable of dealing with the case, unless the same is commenced within two months after they both first happen to arrive or to be at one time within such jurisdiction;

(3) No order for the payment of money shall be made under this act in any summary proceeding instituted in the United Kingdom, unless such proceeding is commenced within six months after the cause of complaint arises; or, if both or either of the parties happen during such time to be out of the United Kingdom, unless the same is commenced within six months after they both first happen to arrive or to be at one time within the same;

(4) No order for the payment of money shall be made under this act in any summary proceeding instituted in any British possession, unless such proceeding is commenced within six months after the cause of complaint arises; or, if both or either of the parties to the proceeding happen during such time not to be within the jurisdiction of any court capable of dealing with the case, unless the same is commenced within six months after they both first happen to arrive or be at one time within such jurisdiction.

And no provision contained in any other act or acts, ordinance or ordinances for limiting the time within which summary proceedings may be instituted, shall affect any summary proceeding under this act.

SECTION 526. Any document required by this act to be executed in the presence of or to be attested by any witness or witnesses, may be proved by the evidence of any person who is able to bear witness to the requisite facts, without calling the attesting witness or witnesses or any of them.

SECTION 527. Whenever any injury has, in any part of the

world, been caused to any property belonging to Her Majesty or to any of Her Majesty's subjects by any foreign ship, if at any time thereafter such ship is found in any port or river of the United Kingdom or within three miles of the coast thereof, it shall be lawful for the judge of any court of record in the United Kingdom, or for the judge of the high court of admiralty, or in Scotland the court of session, or the sheriff of the county within whose jurisdiction such ship may be, upon its being shown to him by any person applying summarily that such injury was probably caused by the misconduct or want of skill of the master or mariners of such ship, to issue an order directed to any officer of customs or other officer named by such judge, requiring him to detain such ship until such time as the owner, master, or consignee thereof has made satisfaction in respect of such injury, or has given security, to be approved by the judge, to abide the event of any action, suit, or other legal proceeding that may be instituted in respect of such injury, and to pay all costs and damages that may be awarded thereon; and any officer of customs or other officer to whom such order is directed shall detain such ship accordingly.

SECTION 528. In any case where it appears that before any application can be made under the foregoing section such foreign ship will have departed beyond the limits therein mentioned, it shall be lawful for any commissioned officer on full pay in the military or naval service of Her Majesty, or any British officer of customs, or any British consular officer, to detain such ship until such time as will allow such application to be made and the result thereof to be communicated to him; and no such officer shall be liable for any costs or damages in respect of such detention unless the same is proved to have been made without reasonable grounds.

SECTION 529. In any action, suit, or other proceeding in relation to such injury, the person so giving security as aforesaid shall be made defendant or defender and shall be

stated to be the owner of the ship that has occasioned such damage; and the production of the order of the judge made in relation to such security shall be conclusive evidence of the liability of such defendant or defender to such action, suit, or other proceeding.

Legal Procedure (Scotland).

SECTION 530. In Scotland every offence which by this act is described as a felony or misdemeanor may be prosecuted by indictment or criminal letters at the instance of Her Majesty's advocate before the high court of justiciary, or by criminal libel at the instance of the procurator fiscal of the county, before the sheriff, and shall be punishable with fine and with imprisonment, with or without hard labor in default of payment, or with imprisonment, with or without hard labor, or with both, as the court may think fit, or in the case of felony with penal servitude, where the court is competent thereto; and such court may also, if it think fit, order payment by the offender of the costs and expenses of the prosecution.

SECTION 531. In Scotland, all prosecutions, complaints, actions, or proceedings under this act, other than prosecutions for felonies or misdemeanors, may be brought in a summary form before the sheriff of the county, or before any two justices of the peace of the county or burgh where the cause of such prosecution or action arises, or where the offender or defender may be for the time, and when of a criminal nature or for penalties, at the instance of the procurator fiscal of court, or at the instance of any party aggrieved, with concurrence of the procurator fiscal of court; and the court may, if it think fit, order payment by the offender or defender of the costs of the prosecution or action.

SECTION 532. In Scotland, all prosecutions, complaints, actions, or other proceedings under this act may be brought

either in a written or printed form, or partly written and partly printed, and where such proceedings are brought in a summary form it shall not be necessary in the complaint to recite or set forth the clause or clauses of the act on which such proceeding is founded, but it shall be sufficient to specify or refer to such clause or clauses, and to set forth shortly the cause of complaint or action and the remedy sought; and when such complaint or action is brought in whole or in part for the enforcement of a pecuniary debt or demand, the complaint may contain a prayer for warrant to arrest upon the dependence.

SECTION 533. In Scotland, on any complaint or other proceeding brought in a summary form under this act being presented to the sheriff clerk or clerk of the peace, he shall grant warrant to cite the defender to appear personally before the said sheriff or justices of the peace on a day fixed, and at the same time shall appoint a copy of the same to be delivered to him by a sheriff officer or constable, as the case may be, along with the citation; and such deliverance shall also contain a warrant for citing witnesses and havers to compare at the same time and place to give evidence and produce such writs as may be specified in their citation; and where such warrant has been prayed for in the complaint or other proceeding, the deliverance of the sheriff clerk or clerk of the peace shall also contain warrant to arrest upon the dependence in common form: Provided always, that where the apprehension of any party, with or without a warrant, is authorized by this act, such party may be detained in custody until he can be brought at the earliest opportunity before any two justices, or the sheriff who may have jurisdiction in the place, to be dealt with as this act directs, and no citation or inducie shall in such case be necessary.

SECTION 534. When it becomes necessary to execute such arrestment on the dependence against goods or effects of the defender within Scotland, but not locally situated within

the jurisdiction of the sheriff or justices of the peace by whom the warrant to arrest has been granted, it shall be competent to carry the warrant into execution on its being indorsed by the sheriff clerk or clerk of the peace of the county or burgh respectively within which such warrant comes to be executed.

SECTION 535. In all proceedings under this act in Scotland the sheriff or justices of the peace shall have the same power of compelling attendance of witnesses and havers as in cases falling under their ordinary jurisdiction.

SECTION 536. The whole procedure in cases brought in a summary form before the sheriff or justices of the peace in Scotland shall be conducted *vivâ voce*, without written pleadings, and without taking down the evidence in writing, and no record shall be kept of the proceedings other than the complaint, and the sentence or decree pronounced thereon.

SECTION 537. It shall be in the power of the sheriff or justices of the peace in Scotland to adjourn the proceedings from time to time to any day or days to be fixed by them, in the event of absence of witnesses or of any other cause which shall appear to them to render such adjournment necessary.

SECTION 538. In Scotland all sentences and decrees to be pronounced by the sheriff or justices of the peace upon such summary complaints shall be in writing; and where there is a decree for payment of any sum or sums of money against a defender, such decree shall contain warrant for arrestment, poinding, and imprisonment in default of payment, such arrestment, poinding, or imprisonment to be carried into effect by sheriffs, officers, or constables, as the case may be, in the same manner as in cases arising under the ordinary jurisdiction in the sheriff or justices: Provided always, that nothing herein contained shall be taken or construed to repeal or affect an act of the fifth and sixth years of William the Fourth, intituled “An act for abolishing, in Scotland, imprisonment for civil debts of small amount.”

SECTION 539. In all summary complaints and proceedings for recovery of any penalty or sum of money in Scotland, if a defender who has been duly cited shall not appear at the time and place required by the citation, he shall be held as confessed, and sentence or decree shall be pronounced against him in terms of the complaint, with such costs and expenses as to the court shall seem fit: Provided always, that he shall be entitled to obtain himself reponed against any such decree at any time before the same be fully implemented, by lodging with the clerk of court a reponing note, and consigning in his hands the sum decerned for, and the costs which had been awarded by the court, and on the same day delivering or transmitting through the post to the pursuer or his agent a copy of such reponing note; and a certificate by the clerk of court of such note having been lodged shall operate as a sist of diligence till the cause shall have been reheard and finally disposed of, which shall be on the next sitting of the court, or on any day to which the court shall then adjourn it.

SECTION 540. In all summary complaints or other proceedings not brought for the recovery of any penalty or sum of money in Scotland, if a defender, being duly cited, shall fail to appear, the sheriff or justices may grant warrant to apprehend and bring him before the court.

SECTION 541. In all cases where sentences or decrees of the sheriff or justices require to be enforced within Scotland, but beyond the jurisdiction of the sheriff or justices by whom such sentences or decrees have been pronounced, it shall be competent to carry the same into execution upon the same being indorsed by the sheriff clerk or clerk of the peace of the county or burgh within which such execution is to take place.

SECTION 542. No order, decree, or sentence pronounced by any sheriff or justice of the peace in Scotland under the authority of this act shall be quashed or vacated for any misnomer, informality, or defect of form; and all orders, de-

crees, and sentences so pronounced shall be final and conclusive, and not subject to suspension, advocacy, reduction, or to any form of review or stay of execution, except on the ground of corruption or malice on the part of the sheriff or justices, in which case the suspension, advocacy, or reduction must be brought within fourteen days of the date of the order, decree, or sentence complained of: Provided always, that no stay of execution shall be competent to the effect of preventing immediate execution of such order, decree, or sentence.

SECTION 543. Such of the general provisions with respect to jurisdiction, procedure, and penalties contained in this act as are not inconsistent with the special rules hereinbefore laid down for the conduct of legal proceedings and the recovery of penalties in Scotland, shall, so far as the same are applicable, extend to such last mentioned proceedings and penalties: Provided always, that nothing in this act contained shall be held in any way to annul or restrict the common law of Scotland with regard to the prosecution or punishment of offences at the instance or by the direction of the lord advocate, or the rights of owners or creditors in regard to enforcing a judicial sale of any ship and tackle, or to give to the high court of admiralty of England any jurisdiction in respect of salvage in Scotland which it has not heretofore had or exercised.

Enactment of Merchant Shipping Act, 1876 (39 and 40 Vict., c. 80), Applied.

SECTION 34. Where under the merchant shipping acts, 1854 to 1876, or any of them, a ship is authorized or ordered to be detained, any commissioned officer on full pay in the naval or military service of Her Majesty, or any officer of the board of trade or customs, or any British consular officer may detain the ship, and if the ship after such detention or after service on the master of any notice of or order for

such detention proceeds to sea before it is released by competent authority, the master of the ship, and also the owner, and any person who sends the ship to sea, if such owner or person be party or privy to the offence, shall forfeit and pay to Her Majesty a penalty not exceeding one hundred pounds.

Where a ship so proceeding to sea takes to sea when on board thereof in the execution of his duty any officer authorized to detain the ship, or any surveyor or officer of the board of trade or customs, the owner and master of the ship shall each be liable to pay all expenses of and incidental to the officer or surveyor being so taken to sea, and also a penalty not exceeding one hundred pounds, or, if the offence is not prosecuted in a summary manner, not exceeding ten pounds for every day until the officer or surveyor returns, or until such time as would enable him after leaving the ship to return to the port from which he is taken, and such expenses may be recovered in like manner as the penalty.

EXHIBIT 18.

Order in Council, Issued under "The Behring Sea Award Act, 1894," for Carrying into Effect the Provisions of the Behring Sea Arbitration Award of August 15, 1893. Windsor, April 30, 1894.

At the Court at Windsor, the 30th day of April, 1894.

Present: The Queen's Most Excellent Majesty.

Lord President.

Lord Chamberlain.

Lord Steward.

Sir Charles Russell.

Earl of Chesterfield.

Sir Frank Lascelles.

Whereas by "The Behring Sea Award Act, 1894," it is enacted that Her Majesty the Queen in Council may make

orders for carrying into effect the provisions of the Behring Sea Arbitration Award set out in the first schedule to that act, and therein referred to as the scheduled provisions:

And whereas by the said act, it is also enacted that an order in council made under that act may provide that such officers of the United States of America as are specified in the order may, in respect of offences under that act, exercise the like powers under that act as may be exercised by a commissioned officer of Her Majesty in relation to a British ship, and the equipment and certificate thereof, or such of those powers as appear to Her Majesty in council to be exercisable under the laws of the United States of America against ships of the United States, and that such British officers as are specified in the order may exercise the powers conferred by that act, with any necessary modifications specified in the order, in relation to a ship of the United States of America and the equipment and certificate thereof;

And whereas the powers which article 1 of this order confers upon the officers of the United States therein specified are powers which, in respect of offences under the said act, may be exercised by a commissioned officer of Her Majesty in relation to a British ship and the equipment and certificate thereof, and appear to Her Majesty in council to be exercisable under the law of the United States against ships of the United States:

Now, therefore, Her Majesty, in virtue of the powers vested in her by the said recited act, and of all other powers enabling her in that behalf, is hereby pleased, by and with the advice of Her Privy Council, to order, and it is hereby ordered, as follows:

1. The commanding officer of any vessel belonging to the naval or revenue service of the United States of America, and appointed for the time being by the President of the United States for the purpose of carrying into effect the powers conferred by this article, the name of which vessel

shall have been communicated by the President of the United States to Her Majesty as being a vessel so appointed as aforesaid, may, if duly commissioned and instructed by the President in that behalf, seize and detain any British vessel which has become liable to be forfeited to Her Majesty under the provisions of the recited act, and may bring her for adjudication before any such British court of admiralty as is referred to in section 103 of "The Merchant Shipping Act, 1854" (which section is set out in the second schedule to the recited act), or may deliver her to any such British officer as is mentioned in the said section for the purpose of being dealt with pursuant to the recited act.

2. The commanding officer of any vessel belonging to the naval or revenue service of Her Majesty, and appointed for the time being by Her Majesty for the purpose of carrying into effect the powers conferred by this article, the name of which vessel shall have been communicated by Her Majesty to the President of the United States as being a vessel so appointed as aforesaid, may, if duly commissioned and instructed by Her Majesty, in that behalf, exercise the powers conferred by the recited act in relation to a ship of the United States: Provided, that such officer, after seizing and detaining a ship of the United States in exercise of the said powers, shall take her for adjudication before a court of the United States having jurisdiction to adjudicate in the matter, or deliver her to any naval or revenue officer or other authorities of the United States.

3. Until arrangements for giving further effect to articles 4 and 7 of the said scheduled provisions shall have been made between Her Majesty and the Government of the United States, the following provisions should have effect:

(a) A Secretary of State, or any person duly authorized by him for the purpose, may grant a special licence in such form and manner as he may think fit to any British sailing vessel authorizing such vessel for the present year to fish for fur seals during the period of time in the manner and in

the waters in which fur-seal fishing is allowed by the recited act, and until the delivery of such special licence any British sailing vessel which before the date of this order has left port and is or is intended to be employed in the said fishing shall be deemed to have been duly authorized and duly provided with a special licence within the meaning of the said article 4; and all persons on board any such vessel, which is or is deemed to have been provided with a special licence, shall be deemed to have been duly authorized to engage in fur-seal fishing within the meaning of the said article 7.

(b) A Secretary of State may, by notice published in the *London Gazette*, prescribe the flag to be used by such British vessels as are, or shall be, authorized to fish for fur seals under the provisions of this order, and may cause one such flag to be delivered to each authorized vessel which has left port before receiving a special licence; and every vessel which before leaving port has received a special licence, and every authorized vessel to which such flag shall have been delivered, shall carry such flag during the period of time and in the waters in which fur-seal fishing is allowed by the recited act, and shall hoist it at such times and in such manner as may be prescribed by such notice.

(c) A Secretary of State may give such further provisional directions as he may deem necessary for the due observance of the provisions of the recited act and this order, and any such directions, on being published in such manner as he may direct, shall be observed as if they were contained in this order.

4. This order may be cited as "The Behring Sea Award Order in Council, 1894."

And the Right Honourable the Earl of Kimberley, K. G., the Most Honourable the Marquis of Ripon, K. G., two of Her Majesty's Principal Secretaries of State, and the Lords Commissioners of the Admiralty are to give the necessary directions herein as to them may respectively appertain.

C. L. PEEL.

EXHIBIT 19.

The Secretary of State to the British Ambassador.

DEPARTMENT OF STATE,

WASHINGTON, *April 18, 1894.*

The Secretary of State presents his compliments to his excellency the British ambassador, and has the honor to hand him herewith a list of the vessels which are to compose the United States naval force in Bering Sea during the coming season, which has been sent him by the Secretary of the Navy in compliance with the request made him by Sir Julian Pauncefote.

[*Enclosure.*]

U. S. S. *Mohican*, U. S. S. *Concord*, U. S. S. *Yorktown*, U. S. S. *Bennington*, U. S. S. *Ranger*, U. S. S. *Alert*, U. S. S. *Adams*, U. S. S. *Petrel*, U. S. S. *Albatross*, revenue cutter *Bear*, revenue cutter *Rush*, revenue cutter *Corwin*.

EXHIBIT 20.

Original Draft of Instructions to the Commanding Officer of the U. S. Naval Forces in Behring Sea.

NAVY DEPARTMENT,

WASHINGTON, *April 18, 1894.*

SIR:

1. Having been detailed to command a force of naval vessels and revenue cutters to carry out the provisions of an act of Congress approved April 6, 1894, "to give effect to the award rendered by the Tribunal of Arbitration at Paris, under the treaty between the United States and Great

Britain, concluded at Washington, February twenty-ninth, eighteen hundred and ninety-two, for the purpose of submitting to arbitration certain questions concerning the preservation of fur seals," and of the President's proclamation of the same, dated Washington, D. C., April 9, 1894, you will order the vessels under your command to warn all American and British vessels they may meet outside of the waters prohibited by this act not to enter these waters for the purpose of sealing during the periods of time in which fur-seal fishing is so prohibited, and you will deliver to the commanding officer of each vessel so warned a copy of the President's proclamation, of the British act, and of these instructions.

2. An entry, showing the notice of warning, shall be made upon the register of all vessels of the United States and Great Britain that have been warned.

3. In accordance with the provisions of the above-mentioned act, as appears by reference to section 1 thereof, fur-seal fishing is forbidden to the persons mentioned therein, and to all subjects of Great Britain, to persons owing the duty of obedience to the laws or the treaties of Great Britain, and to all persons belonging to or on board of a vessel of Great Britain, at any time or in any manner whatever, outside of territorial waters, in the waters surrounding the Pribilof Islands within a zone of 60 geographical miles thereof (60 to a degree of latitude) around said islands, *inclusive* of the territorial waters.

You will observe that the act of Congress extends the zone referred to in this paragraph 60 (geographical) miles around said islands, *exclusive* of the territorial waters, but you are hereby instructed to treat the limit as extending only 60 (geographical) miles around said islands, *inclusive* of the territorial waters. The word *exclusive* was inadvertently inserted in the act of Congress instead of the word *inclusive*, which appears in the award, and which it is the purpose of the act to enforce.

4. During the season extending from May 1 to July 31, both inclusive in each year, fur-seal fishing is forbidden to all persons mentioned in the first section of the act, and to all subjects of Great Britain, to persons owing the duty of obedience to the laws or the treaties of Great Britain, and to all persons belonging to or on board of a vessel of Great Britain, not only in the zone mentioned in the third paragraph of these instructions, but in that part of the Pacific Ocean, including Bering Sea, which is situated to the north of the thirty-fifth degree of North latitude and to the east of the one hundred and eightieth degree of longitude from Greenwich, till it strikes the water boundary between the United States and Russia. This boundary line passes through a point in Bering's Straits on the parallel of $65^{\circ} 30'$, north latitude, at its intersection by the meridian which passes midway between the islands of Krusenstern, or Ingaloock, and the island of Ratmanoff, or Noonarbook, and proceeds due north, without limitation, into the same frozen ocean. The same western limit, beginning at the same initial point, proceeds thence in a course nearly southwest through Bering's straits and Bering Sea, so as to pass midway between the northwest point of the Island of St. Lawrence and the southeast point of Cape Choukotski, to the meridian of one hundred and seventy-two west longitude; thence, from the intersection of that meridian, in a southwesterly direction until it strikes the one hundred and eightieth degree of longitude from Greenwich.

5. The regulations respecting the "special license" for sailing vessels, and the "distinguishing flag" to be worn by the same during the open season, mentioned in sections 3 and 7 of the act, are hereafter to be prescribed and promulgated by the Governments of the United States and Great Britain.

6. Any vessel or person described in the first section of this act, or any subject of Great Britain, or person owing obedience to the laws or the treaties of Great Britain, or

any person belonging to or on board of any vessel of Great Britain, unauthorized by this act, found to be or to have been employed in sealing during the period of time and in the waters therein prohibited, whether with or without warning, and any of such vessels or persons found therein, whether warned or not, having on board or in their possession apparatus or implements suitable for taking seal, or seal skins, or bodies of seals, you will order seized.

7. The commanding officer making the seizure will, at the time thereof, draw up a declaration in writing stating the condition of the seized vessel, the date and place of seizure, giving latitude and longitude and circumstances showing guilt. The seized vessel will be brought or sent, as soon as practicable, with all persons on board thereof, in charge of a sufficient force to insure delivery, together with witnesses and proofs, and the declaration of the officer making the seizure, if American, to the most convenient port of Alaska, California, Oregon, or Washington, and there delivered to the officers of the United States court having jurisdiction to try the offense and impose penalties for the same; and, if British, to Unalaska, and there delivered to the senior British naval officer present, or to the most convenient port in British Columbia, and delivered to the proper authorities of Great Britain, or delivered to the commanding officer of any British vessel charged with the execution of the award herein referred to.

8. A signed and certified list of the papers of the seized vessel will be delivered to the master thereof, and a duplicate copy will be transmitted with the declaration.

9. Copies of the act of the British Parliament are herewith inclosed.

Very respectfully,

H. A. HERBERT,
Secretary of the Navy.

COMMANDER CHARLES E. CLARK, U. S. N.,

Commanding U. S. Naval Force in Bering Sea,

U. S. S. *Mohican*, Port Townsend, Washington.

EXHIBIT 21.

The British Ambassador to the Secretary of State.

WASHINGTON, April 30, 1894.

SIR:

In accordance with the arrangement made when I had the honor of an interview with you and the Secretary of the Navy at the State Department, Mr. Herbert was good enough to send me on the 19th instant the draft of the instructions which it was proposed to issue to the officer commanding the United States naval force in Bering Sea for his guidance in carrying out the provisions of the act of Congress passed to give effect to the award of the Bering Sea Tribunal of Arbitration.

On the following day I transmitted the draft instructions to my Government for their observations, and I am now in receipt of a telegram from Her Majesty's principal secretary of state for foreign affairs, in which I am directed to draw your attention to paragraph 6 of the draft instructions, so far as it relates to British vessels. That paragraph requires modification in order to bring it, as regards the powers to be exercised by United States cruisers over British vessels, within the limits prescribed by the British Order in Council conferring such powers.

The Earl of Kimberley desires me to state to you that the order in council which is about to be issued to empower United States cruisers to seize British vessels will only authorize them to make seizures of vessels contravening the provisions of the British act of Parliament, or, in other words, the provisions of the award.

There is no clause in the British act corresponding with section 10 of the United States act of Congress. United States cruisers cannot therefore seize British vessels merely for having on board, while within the area of the

award and during the close season, implements suitable for taking seal. The mode in which such vessels should be dealt with is indicated in the instructions issued on that point to the British naval officers, and of which I have the honor to inclose a copy, and Lord Kimberley suggests that the instructions to the United States cruisers should coincide with the British instructions so far as regards the seizure of British vessels. The Secretary of the Navy was good enough to furnish me, in addition to the draft of the proposed instructions to the United States cruisers, with a map intended to accompany them and purporting to show the delimitation of the waters embraced in the award. As regards this map Lord Kimberley points out that the red line drawn thereon is not quite correct. It makes the meridian 180 strike the Russian water boundary north of the sixtieth degree of latitude, instead of reaching it south of that degree, as it should do according to the award.

I have the honor, etc.,

JULIAN PAUNCEFOTE.

(Enclosure.)

Instructions to British cruisers as to seizure.

If a vessel which appears to be a sealing vessel is found in any waters in which, at the time, hunting is prohibited, you will ascertain whether she is there for the purpose of hunting, or whether she has hunted, or whether she was carried there by stress of weather, or by mistake, during fog, or is there in the ordinary course of navigation on her passage to any place.

If you are satisfied that the vessel has hunted contrary to the act, you will seize her and order her to proceed to the British port hereinafter mentioned; but if you are of opinion that no offense has been committed you should warn her and keep her, as far as you think necessary and as is practicable, under supervision.

Whether this vessel has been engaged in hunting you must judge from the presence of sealskins or bodies of seals on board and other circumstances and indications. If the vessel is found outside the specified limits and it is evident that she has been hunting within those limits, and that thus an offense has been committed, you will seize her and send her to port.

A vessel, though herself not within the prohibited limits, may violate the act by her boats hunting within such limits.

EXHIBIT 22.

The Secretary of State to the British Ambassador.

DEPARTMENT OF STATE,

WASHINGTON, *May 9, 1894.*

EXCELLENCY:

I have the honor to acknowledge the receipt of your note of yesterday's date, in which, referring to the steps taken to warn sealing vessels in Bering Sea, you ask whether the naval officers of the United States would be instructed to give to British sealers they may speak copies of the Bering Sea award act and of an explanatory map thereto annexed, of which you offer to furnish copies for that purpose.

By the second paragraph of the amended instructions issued by the Secretary of the Navy to the commanding officers of the United States fleet in Bering Sea, under date of 4th instant, in place of the previous instructions of April 18, the British act is among the papers to be delivered to the masters of sealing vessels so warned.

It will give me much pleasure to receive and communicate to the Secretary of the Navy for appropriate distribution the copies of the British act and the annexed map which you offer to supply.

I inclose for your information copies of the above-mentioned naval instructions and of the regulations governing vessels employed in fur-seal fishing.

I have, etc.,

W. Q. GRESHAM.

(*Enclosure.*)

*Instructions to the Commanding Officer of the U. S. Naval
Forces in Bering Sea.*

NAVY DEPARTMENT,
WASHINGTON, *May 4, 1894.*

SIR:

Congress having passed acts which were approved April 6, 1894, and April 24, 1894, and the Government of the United States having made arrangements with Great Britain to give effect to the award rendered by the Tribunal of Arbitration at Paris, under the treaty between the United States and Great Britain, concluded at Washington, February 29, 1892, for the purpose of submitting to arbitration certain questions concerning the preservation of fur seals, you are detailed to command a force of naval and revenue vessels to carry out the provisions of the award, of the acts of Congress, and of the President's proclamation dated Washington, D. C., April 9, 1894.

You will order the vessels under your command to warn all American and British vessels they may meet not to engage in fur-seal fishing within the area of the award, during the periods of time in which fur-seal fishing is forbidden, and to deliver to the master of each of such vessels a copy of the President's proclamation, of the act of Congress, approved April 24, 1894, of the President's regulations governing vessels employed in fur-seal fishing, of the British act, and of these instructions.

Whenever a vessel may be warned, the commander of the cruiser, or the customs officer, as the case may be, shall, after making an examination of the vessel, leave with the master of said vessel a certificate showing the date and place of examination, the number of seal skins, and the number of bodies of seals then on board, and shall preserve a duplicate of said certificate. And no officer, subsequently

boarding such vessel, shall seize the same, unless he shall be satisfied, as herein provided, that it has committed a violation of law by killing fur seal within the area of the award subsequent to the 30th day of April, 1894.

Fur-seal fishing is forbidden to all persons mentioned in section 1 of said act of Congress, to all subjects of Great Britain, to persons owing the duty of obedience to the laws or the treaties of Great Britain, and to all persons belonging to or on board of a vessel of Great Britain, at any time, or in any manner whatever, outside of territorial waters, in the waters surrounding the Pribilof Islands within a zone of 60 geographical miles thereof (60 to a degree of latitude) around said islands, inclusive of the territorial waters.

Fur-seal fishing is forbidden during the season extending from May 1, to July 31, both inclusive, in each year, to all persons mentioned in the first section of said act of Congress, and to all subjects of Great Britain, to persons owing the duty of obedience to the laws or the treaties of Great Britain, and to all persons belonging to or on board of a vessel of Great Britain, not only in the zone mentioned in the fourth paragraph of these instructions, but in that part of the Pacific Ocean, including Bering Sea, which is situated to the north of the thirty-fifth degree of north latitude and to the east of the one hundred and eightieth degree of longitude from Greenwich, till it strikes the water boundary between the United States and Russia. This boundary line passes through a point in Bering Straits on the parallel of $65^{\circ} 30'$ north latitude, at its intersection by the meridian which passes midway between the islands of Krusenstern or Ignalook, and the island of Ratmanoff or Noonarbook, and proceeds due north, without limitation, into the same frozen ocean. The same western limit, beginning at the same initial point, proceeds thence in a course nearly southwest, through Bering Straits and Bering Sea, so as to pass midway between the northwest point of the island of St. Lawrence and the southeast point of Cape Choukotski to the

meridian of one hundred and seventy-two west longitude; thence, from the intersection of that meridian, in a south-westerly direction, until it strikes the one hundred and eightieth degree of longitude from Greenwich.

Any vessel or person described in the first section of said act of Congress, or any vessel or subject of Great Britain, or person owing obedience to the laws or the treaties of Great Britain, or any person belonging to or on board of any vessel of Great Britain, unauthorized by this act found to be or to have been engaged in fur-seal fishing within the area of the award, during the periods of time in which fur-seal fishing is forbidden, you will order seized.

If a vessel which appears to be a sealing vessel is found within the area of the award, during the periods of time in which fur-seal fishing is forbidden, you will ascertain whether she is there for the purpose of fur-seal fishing, whether she has been engaged in fur-seal fishing, whether she was carried there by stress of weather, by a mistake during foggy or thick weather, or is there in the ordinary course of navigation, making the best of her way to any place. You must judge whether such vessel has been engaged in fur-seal fishing from the presence of seal skins or bodies of seals on board, and from other circumstances and indications. If such vessel is found outside of the area of the award, and it is evident that she has been engaged in fur-seal fishing within said area, and has thus committed an offense, you will order her seized. A vessel may violate the law by her boats fur-seal fishing within said area, while the vessel, herself, is outside of said area.

The commanding officer making the seizure will, at the time thereof, draw up a declaration in writing, stating the condition of the seized vessel, the date and place of seizure, giving latitude and longitude and circumstances showing guilt. The seized vessel will be brought or sent, as soon as practicable, with all persons on board thereof, in charge of a sufficient force to insure delivery, together with witnesses

and proofs, and the declaration of the officer making the seizure, if American, to the most convenient port of Alaska, California, Oregon, or Washington, and there delivered to the officers of the United States court having jurisdiction to try the offense and impose penalties for the same; and if British, to Unalaska, and there delivered to the senior British naval officer present, or carried to the most convenient port in British Columbia, and delivered to the proper authorities of Great Britain, or delivered to the commanding officer of any British vessel charged with the execution of the award herein referred to.

A signed and certified list of the papers of the seized vessel will be delivered to the master thereof, and a duplicate copy will be transmitted with the declaration.

You will arrange with the commanders of the British vessels engaged in carrying out the provisions of the award for the mutual delivery of vessels of the one country seized by officers of the other.

These instructions will remain in force only during the present season.

Very respectfully,

H. A. HERBERT,
Secretary of the Navy.

COMMANDER CHARLES E. CLARK, U. S. N.,
Commanding U. S. Naval Force in Bering Sea,
U. S. S. *Mohican*, Port Townsend, Wash.

EXHIBIT 23.

The British Ambassador to the Secretary of State.

WASHINGTON, *May 10, 1894.*

SIR:

In accordance with the agreement arrived at during the recent negotiations in relation to the means of giving effect for the present year to the fishery regulations prescribed

by the award of the Bering Sea Tribunal of Arbitration, I have the honor to inclose for your approval a memorandum recording the arrangements concluded on that subject and accepted by both Governments, and I shall feel obliged if you will be good enough to inform me whether the memorandum meets with your approval.

I have, etc.

JULIAN PAUNCEFOTE.

(*Enclosure.*)

Memorandum of the arrangements agreed upon between the Governments of Great Britain and the United States for giving effect during the year 1894 to the fur-seal fishery regulations prescribed by the award of the Bering Sea Tribunal of Arbitration.

LICENSES.

The special license to be issued to sealing vessels under article 4 of the regulations of the award shall declare that the licensee has given satisfactory evidence of the fitness of the hunters to be employed by him, as required by article 7.

It shall be issued subject to the observance of the said regulations and to the penalties imposed by law for the violation thereof.

It shall be in such form as each Government shall determine for itself.

DISTINCTIVE FLAG.

Every sealing vessel provided with a special license shall show, under her national colors, a flag, not less than 4 feet square, composed of two equal pieces, yellow and black, joined from the right-hand upper corner of the fly to the left-hand lower corner of the luff, the part above and to the left to be black and the part to the right and below to be yellow.

REGULATIONS RESPECTING SEALING VESSELS LAWFULLY NAVIGATING THE MARITIME AREA OF THE AWARD DURING THE CLOSE SEASON.

1. No sealing vessel shall be seized or detained by reason of the absence of a license or of a distinctive flag, or merely on account of seals, seal skins, or fishery implements being found on board; but, unless there be evidence of unlawful sealing, the commander of the cruiser visiting such vessel shall deliver to the master a certificate of the number of seals and seal skins found on board on that date (keeping a copy of such certificate) and allow the vessel to proceed on her way.

2. Any sealing vessel lawfully traversing, or intending to traverse, the said waters during the close season, for the purpose of returning to her home port, or of proceeding to any other port, or to or from the sealing grounds, or for any other legitimate purpose, may, on the application of the master, have her fishery implements sealed up and an entry thereof made on her clearing and log book, and such sealing up and entry shall be a protection to the vessel against interference by any cruiser in the said waters during the close season so long as the seals so affixed shall remain unbroken, unless there shall be evidence of seal hunting notwithstanding.

3. The sealing up of fishery implements and the entry thereof may be effected by any naval officer or customs officer, or (in Japan) by any consul of the nation to which the vessel belongs. It may also be effected at sea, as regards United States vessels, by the commander of a British cruiser, and, as regards British vessels, by the commander of a United States cruiser.

EXHIBIT 24.

The Secretary of State to the British Ambassador.

DEPARTMENT OF STATE,
WASHINGTON, *May 11, 1894.*

EXCELLENCY:

In reply to your excellency's note of the 10th instant inclosing a memorandum of certain arrangements agreed upon between our respective Governments for giving effect during the year 1894 to the fur-seal fishery regulations prescribed by the award of the Bering Sea Tribunal of Arbitration, I have the honor to state that I approve of the memorandum as containing a correct record of the arrangements agreed upon.

I have the honor to be, etc.,

W. Q. GRESHAM.

EXHIBIT 25.

The Secretary of State to Lord Gough.

DEPARTMENT OF STATE,
WASHINGTON, *June 14, 1895.*

MY LORD:

I have the honor to apprise you of the receipt of a letter of the 11th instant from the Secretary of the Treasury, reporting, in view of a communication of the 11th ultimo from Captain Munger, of the U. S. revenue cutter *Corwin*, the seizure of the British sealing schooner *Shelby* on May 11 last.

The declaration of seizure prepared by Captain Munger and delivered to the commanding officer of H. M. S. *Pheasant* states that the vessel was seized for disregarding the proclamation of the President of the United States and the

act of Congress of April 6, 1894. From an examination of the report of Captain Munger, it would appear that the seizure was made on the ground that there was cause to believe that said vessel had killed fur seals within the award area during the closed season, the reason for such belief being found in the possession by the vessel of seal skins, implements, and outfits, together with salt, shotguns, and ammunition.

On receipt of said report Captain Hooper, commanding officer of the patrolling fleet, was reminded that the act of Congress of April 6, 1894, was applicable only to American vessels. He was also directed if, on investigation, he found that said vessel was seized on the charge of illegal killing during the closed season, to instruct Captain Munger to deliver to the commanding officer of H. M. S. *Pheasant* an amended declaration of seizure, assigning as the cause the violation of the second article of the regulations of the Paris award, as set forth in the schedules annexed to the British act of Parliament known as the Bering Sea award act of 1894.

In this connection the receipt signed by the commander of H. M. S. *Pheasant* is called to your attention:

“SITKA, May 13, 1895.

In accordance with the provisions of section 12, article 9, of the Bering Sea fisheries award, I have this day received from C. L. Hooper, captain, United States Revenue Cutter Service, commanding Bering Sea fleet, the British schooner *Shelby*, of Victoria, British Columbia, C. Classen, master, with her tackle, furniture, cargo, and documents, seized by the United States revenue steamer *Corwin*, Capt. F. M. Munger, commanding, for violation of the acts of Congress and of the British Parliament regulating the fur-seal fisheries.

FRANK A. GARFORTH,
Lieutenant, R. N., Commanding
H. B. M. Pheasant.”

Under these circumstances, I request that the consent of Her Majesty's Government be given for the appointment of counsel to represent the Government of the United States in condemnation proceedings against the *Shelby* and such other British vessels as may be seized this season by officers of the United States for violation of the regulations of the Paris award. It is confidently believed that such action will greatly assist in the proper enforcement of the award provisions.

In this connection, I observe that the declaration of seizure will be amended to the end that the libel in admiralty may set forth the breach of the British act of Parliament known as the Bering Sea award act of 1894.

Asking that you will have the kindness to promptly communicate to Her Majesty's Government the purport of this note and to apprise me, at your early convenience, of Her Majesty's decision upon the subject, I have, etc.,

RICHARD OLNEY.

EXHIBIT 26.

The Secretary of State to Mr. Roosevelt.

DEPARTMENT OF STATE,
WASHINGTON, *June 18, 1895.*

SIR:

Among the correspondence transmitted with the Department's instruction No. 713 of May 23, and 740 of the 12th instant, you will find mention of the cases of the British sealing schooners *Wanderer* and *Favourite*, the seizure of which, according to Sir Julian's note of May 11, affords grounds for Her Majesty's Government to reject for the current year the provision of last year's regulations concerning the sealing up of arms on board of vessels traversing the award area during the closed season.

I am informed by the United States consul at Victoria, B. C., that the *Wanderer* having been seized June 9, 1894, in the North Pacific Ocean by the commander of the U. S. cruiser *Concord* and formally delivered to the commander of H. M. S. *Pheasant*, was subsequently taken to Victoria and released by Admiral Stephenson of H. M. S. *Royal Arthur*.

The consul states that upon investigation it was found that all the guns of the *Wanderer*, except one, were secured under seal; that her master had no knowledge that there was a gun on board unsealed in violation of last year's regulations; and further, that Admiral Stephenson "after careful investigation, and acting under legal advice, ordered the release of the schooner, the conclusion having been reached that no case could be made out against her."

I am also advised by the Secretary of the Treasury that his department understands that the British sealing schooner *Favourite*, seized in Bering Sea, August 24, 1894, by the commanding officer of the U. S. S. *Mohican*, was similarly released upon being turned over to the British naval authorities.

I have to instruct you to represent to Her Majesty's Government that this action of the British naval authorities is not in accord with the evident intent and spirit of the legislation enacted by the respective Governments for carrying out the provisions of the Paris award.

These vessels were seized under authority of the order in council of Her Majesty's Government, dated April 30, 1894, whereby United States officers, duly commissioned and instructed by the President, were authorized to seize any British vessel which had violated the Paris award regulations as contained in the act of Parliament, known as "the Bering Sea award act, 1894," and bring her for adjudication before any British court of admiralty, or in lieu thereof to deliver her to any British officer for adjudication before said court.

The plain purpose of the law necessarily required judicial proceedings for the condemnation and forfeiture of every vessel seized for violation of the award provisions, especially those seized by United States officers and delivered to the British authorities as aforesaid, or conversely. In the case in question, however, it would appear that Admiral Stephenson, in discharging said vessel, took upon himself to decide a question which undoubtedly could properly be decided only by the competent British court of admiralty. By no process of reasoning can it be inferred from the terms of the Paris award or of the concurrent legislation of the two countries thereunder, that conviction or acquittal of any offense thereby contemplated could be reached by other than due process of law. No concurrent authority of the naval commanders to decide the question of guilt or innocence appears, and certainly it was never contemplated that the naval commander of the vessel's nationality should alone and on his own account revise and overrule the action of the seizing commander.

The evidence in the case of the *Wanderer* seems clearly to justify the suspicion and belief that some, at least, of the four hundred seal skins found on board had been taken during the prohibited season by means of shotguns, in violation of the award regulations and of the British and American laws. The master gave his arms and ammunition to the commander of the U. S. cruiser *Yorktown* to be secured under seal. Later in the same day he was boarded by the commander of the cruiser *Concord* and stated that the arms and ammunition sealed up by the *Yorktown* were all he had on board. Upon search, however, a breech-loading shotgun and a bag of loaded shells were found concealed in the extreme forward part of the vessel under a pile of iron cans, between decks. While the officer was making an entry in the log book as to this weapon, the master of the vessel was heard to say to the mate, "God damn it, I told you you ought to have had that put in with the others," or words to that effect.

This deception of the master, together with the concealment of the weapon and the presence on board of seal skins and other suspicious evidence revealed on search, clearly should have been submitted to a court of admiralty as evidence in condemnation proceedings.

In the case of the *Farouite*, 1,230 seal skins were found on board, together with a shotgun whose barrels were cut off to 12 inches. It was found that it would shoot accurately for the distance of 50 yards; its use was prohibited by the award regulations.

The cause particularly assigned for these seizures, namely, the carrying of firearms unsealed, taken in connection with the fact that such weapons were forbidden then and there to be used, and that there were also found seal skins on board, would plainly justify the belief that said firearms had been used in violation of article 6 of the award as contained in the British Bering Sea award act of 1894, and the American act of Congress of April 6, 1894.

That the notices of seizure, as prepared by the United States seizing officers, do not with particularity specify the illegal use of these weapons, but rely chiefly upon their presence on board unsealed, clearly would not prevent such use being proved in subsequent proceedings in court for condemnation and forfeiture, the effect of said notices being merely to acquaint the authorities to whom the ships are turned over of the fact of the seizure, and of the particular offenses relied upon for maintaining a libel in condemnation proceedings. It would seem perfectly clear that additional breaches of the law could be assigned and made the subject of condemnation proceedings at any time before the trial.

The instructions issued by the British Government to the commanders of its cruising vessels for the season of 1894, would, it is submitted, have imposed upon such officers under similar circumstances the duty of seizing these vessels. Said instructions, in part, were as follows:

“If you are satisfied that a vessel has hunted contrary to the act, you will seize her. * * * Whether the vessel has been engaged in hunting, you must judge from the presence of seal skins or bodies of seals on board, and other circumstances and indications.”

The preceding facts and considerations justify the formal protest of this Government against the aforesaid action of the British naval authorities, as reported, in releasing the seized vessels, without due judicial process, and constrain it to request that in future every vessel seized by United States officers under the provisions of the award and the concurrent legislation and regulations in regard thereto shall be proceeded against for condemnation in the admiralty court having jurisdiction in the premises.

You will communicate the foregoing to the Earl of Kimberley by reading this instruction and, should he so desire, furnishing him with a copy.

I am, &c., &c.

RICHARD OLNEY.

EXHIBIT 27.

The Acting Secretary of State to Lord Gough.

DEPARTMENT OF STATE,

WASHINGTON, *July 1, 1895.*

MY LORD:

Your note of May 27 last, informing me that Her Majesty's Government had designated the naval vessels *Nymph* and *Pheasant* to patrol that part of the North Pacific Ocean and Bering Sea embraced within the terms of the award of the Tribunal of Arbitration during the season of 1895 was duly received and communicated to the Secretary of the Treasury, to whose Department the supervision of the corresponding control of those waters under the

award and regulations of the Paris tribunal duly pertains.

It is proper, however, in the interest of the efficient fulfillment of the obligations of the respective Governments under the award and findings of the Paris tribunal, that the attention of Her Majesty's Government should be drawn to the obvious inequality and inadequacy of the measures adopted by Her Majesty's Government to that end, both with regard to the work necessarily to be accomplished and as compared with the steps taken by the United States Government to the same end.

This discrepancy was especially marked during the season of 1894, when Her Majesty's Government designated only one patrolling vessel, the *Pheasant*, although a majority of the schooners engaged in fur-seal fishing within the award area were under the British flag; while of those which entered Bering Sea less than one-half were United States vessels. In that year twelve United States vessels were designated by the President to patrol the award area, viz: *Mohican*, *Bennington*, *Alert*, *Ranger*, *Yorktown*, *Adams*, *Concord*, and *Petrel*; the revenue cutters *Corwin*, *Rush*, and *Bear*, and the Fish Commission steamer *Albatross*. The expense attending the presence of these vessels in the North Pacific Ocean and Bering Sea for the season of 1894, exclusive of the pay of officers and men and also excluding rations, was \$198,304.49.

For the present season of 1895 the discrepancy, although less marked, is still noteworthy; the conditions under which the patrol of those sealing waters is conducted impose in some respects more onerous duties upon the contracting parties in the protection of seal herds from illicit destruction.

There is grave reason to suspect that during the approaching season in Bering Sea, which opens on the 1st of August, sealing vessels will take advantage of the refusal of the British Government to continue the agreement of 1894, which provided for the sealing up of the arms of such

vessels while in Bering Sea, thereby increasing the demands upon the vigilance of the patrolling fleet to detect evasions and infractions of the provisions of the Paris award. In a report from the United States Fish Commission recently transmitted to the Treasury Department it is stated:

“We may reasonably expect a fleet of 56 vessels in those waters (Bering Sea). * * * Regarding Bering Sea, the sealers appear gratified over the fact that their firearms cannot be sealed up. They considered the sealing of arms a great hardship, and their satisfaction over carrying them unsealed must mean a determination to use them whenever they think it safe to do so. Some of them say that when the Japan fleet hear of this they will send more vessels to the sea. There is little doubt but that fire-arms carried into the sea will be used.”

While the sealing fleet in the award area is about the same in numbers as in 1894, the British vessels already cleared for the fur seal fisheries outnumber the American so cleared in about the proportion of 2 to 1. The United States patrolling fleet for this season consists of seven vessels, viz: The revenue cutters *Rush*, *Bear*, *Corwin*, *Wolcott*, *Grant*, and *Perry*, and the Fish Commission steamer *Albatross*.

In view of the vast area to be patrolled, this Government is constrained to suggest that the detail of two naval vessels only on the part of Her Majesty's Government is totally inadequate to the performance of the proper share of the work and responsibility of patrol which necessarily falls to that Government.

I am therefore moved to invite, through you, the earnest attention of Her Majesty's Government to this matter, and to ask for the more active and efficient cooperation in enforcing the legislation concurrently enacted for carrying out the provisions of the Paris award, which this Govern-

ment believes it has a right to expect from Her Majesty's Government in view of the joint obligations which rest upon them in this regard.

While treating of this subject I beg to advert to the importance of obtaining from Her Majesty's Government a speedy answer touching the changes proposed in the scope of the Paris award, and the practicable suggestions and requests contained in my note to Sir Julian Pauncefote of May 10 last, and in the note of Secretary Olney to you of the 14th ultimo. I refer particularly to the proposition in my note of May 10, that the carrying of firearms in Bering Sea be prohibited, or that illegal use shall be presumed from the possession of weapons the use of which is prohibited, as now provided for in section 10 of the act of Congress of April 6, 1894, and as was formerly provided for in the British Bering Sea act of 1891 and the seal fishery (North Pacific) act of 1893. The note of May 10 further requested permission to appoint experts on behalf of the Government of the United States to examine all seal skins landed at British Columbia ports with regard to sex, mode of slaughter, etc., the results found being compared with the log-book entries. In the note of June 14 a request was made that counsel in representation of the Government of the United States be admitted in condemnation proceedings of vessels seized by United States or British officers. The foregoing suggestions being particularly applicable to Bering Sea, where the season opens on the 1st of August next, it will be highly desirable to have a distinct understanding upon the subject reached before that time, and I therefore renew the previous request for an early answer.

I have, etc.,

EDWIN F. UHL,
Acting Secretary.

EXHIBIT 28.

The Marquis of Salisbury to Lord Gough.

(Handed by Lord Gough to the Secretary, September 6, 1895.)

FOREIGN OFFICE, *August 16, 1895.*

MY LORD:

The Earl of Kimberley, in his telegram, No. 23, of the 9th of May, requested Sir J. Pannecote to inform Mr. Gresham that Her Majesty's Government were unwilling to renew the agreement with the United States of the 12th May, 1894, relative to the sealing up of arms on board sealers during the close season in Bering Sea, because the possession of arms was not contrary to the award of the Paris Tribunal of Arbitration, and because, as proved by the seizures of the *Wanderer* and *Farouite*, the agreement had not in practice worked for the protection of British sealers from unnecessary interference.

His excellency was also requested to remind Mr. Gresham that United States naval officers have no right to seize British sealing vessels, except under the order in council for offenses against the British act of Parliament which embodies the award regulations.

The circumstances in connection with the seizures of the *Wanderer* and *Farouite*, above referred to, have been most carefully considered, after some delay occasioned by the necessity of obtaining full information, including reports from Admiral Stephenson, the commander in chief on the North American station.

The *Wanderer*, while in the waters affected by the award, and during the close season, was boarded and the master warned by an officer from the U. S. S. *Yorktown* of the provisions of the award act.

A certain quantity of arms and ammunition was sealed up, and the master signed a statement that the firearms,

etc., then produced were all that belonged to the vessel or to any person attached to her. The seal skins on board were counted, and the number amounted to 400.

On the same day the vessel was again boarded while within the award area by an officer from the U. S. S. *Concord*. The seals placed on the arms in the morning were found to be intact, and the number of seal skins on board corresponded with the number counted by the officer of the *Yorktown*.

Further search was, however, made, and in the extreme forward part of the ship a shotgun, with 39 cartridges, were found, which the mate said belonged to him.

The vessel was thereupon towed to St. Paul, Kadiak Island, formally seized, and sent thence with a prize crew to Unalaska, and handed over to Her Majesty's ship *Pheasant*.

The grounds for the seizure, as given by the commander of the *Concord*, were "the possession of an unsealed gun and ammunition in contravention of the Bering Sea award act, 1894, clause 1, paragraph 2, and clause 3, paragraph 2, as well as of section 10 of the President's proclamation."

The master protested, one of his grounds of protest being that the gun and ammunition were the private property of the mate, and had been hidden without his orders or knowledge. The master also said that he was making direct for St. Paul, a port in United States territory.

Admiral Stephenson, the commander in chief on the North American station, having, after due consideration, come to the conclusion that the vessel could not be successfully prosecuted, decided not to take proceedings against her, and directed that she should be released.

The vessel, however, was unable to complete her voyage, and the master, on behalf of those interested in her, advanced a claim to the amount of the market value of 1,000 seal skins, \$250 on account of damage done to guns through sealing up, and \$120.50 paid for provisions, with interest to be added.

The *Farouite* was seized by the United States war vessel *Mohican* while sealing in Bering Sea during the open season. There were no firearms on board, with the exception of one rocket gun, to be used for signaling purposes, and this appeared on the ship's manifest, signed by the collector of customs at Victoria. While the schooner's papers were under examination by an officer of the *Mohican* the master produced the signaling gun and placed it on the table before the examining officer, who expressed himself satisfied, and entered the following in the schooner's log:

“Boarded the *Farouite*. Found log correctly kept. No violation of regulations, as per log. One shotgun unsealed.”

The *Mohican* steamed off about 2 miles, but returned. The same officer boarded the *Farouite* again and ordered the master to take the schooner's papers and the signal gun on board the *Mohican*. There he was informed that his vessel was seized for having firearms on board.

Lieutenant Wadhams, who was in command of the *Mohican*, stated the grounds for seizure to be that the vessel had on board a double-barrel shotgun, which was found upon trial to carry No. 10 gauge cartridges, and to shoot accurately at least 50 yards, and that the possession of this shotgun was in contravention of article 6 of the Paris award and of the United States act of Congress.

The gun in question was carried for the sole purpose of firing rockets as night signals. It was old, barely 11 inches long in the barrels, with a pistol-handle grip of 9 inches, and quite unfit for killing seals. Not only was the gun mentioned in the ship's manifest, but the master stated that he was verbally authorized by the custom-house official at Kynquot, where, previous to the opening of the fishery season, his fishing implements had been sealed up, to carry it and rockets unsealed. Moreover, Commander Hunter Blair, of Her Majesty's ship *Pheasant*, and Captain Clark,

the commander of the *Mohican*, had agreed to authorize sealing vessels to carry the means of signaling, and the former stated that had application been made to him he would certainly have permitted the *Favourite* to carry the weapon on account of which she was seized. No cartridges or shot of any kind were found on the vessel.

In spite of the master's protest, a prize crew was placed on board the steamer, by which she was taken to Unalaska, and there handed over to the commander of Her Majesty's ship *Pheasant*, by whom she was ordered to proceed to Victoria and report to the collector of customs. The latter applied to the admiral for instructions, considering that he was not justified, under the Bering Sea award act, 1894, in taking any action against the vessel; and the admiral replied that, in his opinion, there was no ground for a prosecution, and, therefore, requested that the schooner should be released.

The master has preferred a claim for \$22,430, the amount at which he estimates the loss incurred by the interruption of his voyage.

It thus appears, both from the information obtained by Her Majesty's Government and from the statements of the United States naval officers themselves, that no evidence existed of any unlawful fishing operation on the part of either of these vessels.

Had the master of the *Wanderer* intended to violate the regulations, he would presumably not have limited his preparations to a single gun and a few cartridges; and it seems highly improbable that, after having been boarded and having had the skins on his vessel counted, he would have run the risk of being discovered with fresh skins on board.

With regard to the *Favourite*, the evidence seems conclusive that the gun found on board was intended solely for signaling purposes, and that it was not suitable for killing seals. The fact that no cartridges or shot of any kind were found on the vessel affords presumption almost amounting to proof that this view is correct.

It must also be remembered, in considering the case of the *Wanderer*, that the arrangement for the sealing up of fishing implements was not obligatory, but was to operate only on the application of the master of a vessel traversing Bering Sea for any legitimate purpose during the close season as a protection to the vessel against interference by any cruiser in the said waters.

The *Parourite* was seized during the open season, when the agreement was not in force, though the entry made in her log by the United States officer seems to indicate that he was not cognizant of this fact.

The statements made by the United States officers of the grounds of seizure show, moreover, that in both cases they relied upon that part of section 10 of the United States act of Congress which reads: "or if any licensed vessel shall be found in waters to which this act applies, having on board apparatus or implements suitable for taking seals, but forbidden then and there to be used, it shall be presumed that the vessel in the one case, and the apparatus or implements in the other, was or were used in violation of this act, until it is otherwise proved."

That section has the obvious effect that without affecting directly to enlarge the obligation which the award imposes upon sealing vessels, it creates an artificial presumption of guilt springing from facts which otherwise might not be evidence of guilt at all, and thereby indirectly makes the award weigh heavier on these vessels.

It is not, however, necessary to discuss the provisions of the act of Congress. Whether an offense against that act was committed or not by either the *Wanderer* or the *Parourite*, a point which seems open to doubt, especially in the case of the *Parourite*, the officers of the United States cruisers were not empowered to seize the vessels except under the order in council for offenses against the British act of Parliament which embodies the award regulations. Those regulations do not prohibit the possession of fire-

arms, nor do the Bering Sea award act and order in council of 1894 contain any provision corresponding to that in article 10 of the act of Congress. A duly authorized officer of the United States is warranted in seizing a British vessel if he believes, or has reasonable ground for believing, that the British law has been violated. But he is not warranted in seizing her if there are no reasonable grounds for that belief, nor is he warranted in applying to British vessels the doctrine of presumptive guilt which is contained in section 10 of the United States act.

The seizure of both the *Wanderer* and the *Favourite* was grounded on what, even if it was an offense against the United States law, was not an offense against British law. For this reason Her Majesty's Government consider that the officers of the United States cruisers were not justified in seizing the vessels, and they feel bound to present to the United States Government the claims for compensation which have been made by the owners, and to request that they may receive the consideration to which they are entitled.

You will read and give a copy of this dispatch to the Secretary of State.

I am, etc.,

SALISBURY.

EXHIBIT 29.

Lord Salisbury to the American Ambassador.

FOREIGN OFFICE, *August 30, 1895.*

YOUR EXCELLENCY:

I have received and taken into consideration the dispatch from the United States Secretary of State to Mr. Roosevelt, which the latter was good enough to communicate to me on the 3d ultimo, relating to the seizures of the British sealing

vessels *Wanderer* and *Favourite* by the U. S. cruisers *Concord* and *Mohican*, for an alleged infringement of the Bering Sea award act of 1894.

With reference to the arguments contained in Mr. Olney's dispatch, I would point out that if the *Wanderer* and the *Favourite* had been arrested for any alleged breach of the above-mentioned act, it is conceded that it would be contrary to the intent and spirit of the legislation that the British naval authorities should release the vessels before trial before a court of competent jurisdiction, but it must be observed that in the case of the *Wanderer* the ground of seizure as given by the commander of the *Concord* was the possession of an unsealed gun and ammunition, in contravention of the Bering Sea award act of 1894 and section 10 of the President's proclamation; and in the case of the *Favourite*, as given by the commander of the *Mohican*, was the possession of an unsealed gun, in contravention of Article VI of the Paris award and section 10 of the act of Congress.

No allegation was made in either case that the vessels had committed or attempted to commit any actual breach of the Bering Sea award act of 1894.

Inasmuch, therefore, as it was clear upon the face of the proceedings that the arrest was not justifiable, it does not appear that the British naval authorities acted contrary to the intent or spirit of the legislation in question. It is not disputed that in the case of a vessel arrested upon an alleged breach of the English act of Parliament bearing on the question additional breaches might be assigned, assuming the seizing officer to be in a position to adduce evidence of such additional breaches, but in this case, as has already been pointed out, there was, up to the time of the release of the vessels, no allegation of any such charge.

While it is conceded that it was never intended that the naval authorities should take upon themselves to decide questions which undoubtedly could only be decided by a

British court of admiralty, it was, on the other hand, equally never intended that vessels should be interfered with, arrested, and handed over to the naval authorities upon any charges other than those which were the subject of the Bering Sea award and consequent legislation.

It is, moreover, quite clear, from the proceedings in these cases, that the seizing officers purported to act under section 10 of the act of Congress (Public, No. 48) of April 6, 1894, which is not binding upon British subjects.

I have, etc.,

SALISBURY.

EXHIBIT 30.

The American Ambassador to the Secretary of State.

EMBASSY OF THE UNITED STATES,

LONDON, *September 3, 1895.*

(Received Sept. 12.)

SIR:

Having reference to the Department's No. 786, of July 9 last (by Mr. Adee, Acting Secretary), relating to the release by the British naval authorities of the sealing schooners *Wanderer* and *Farourite* in advance of and without judicial proceedings to test the legality of the action, I have now the honor to transmit, herewith inclosed, copy of a note just received (and of my acknowledgment thereof dated this day) from the Marquis of Salisbury, under date of August 30, which is intended as a reply to the case of the seizure of the two sealing vessels above referred to, and which was presented to the foreign office by Mr. Roosevelt under your instruction No. 749, of June 18 last.

Before making reply to Lord Salisbury's note I conceive it better to transmit, for your consideration, an expression of my own views, which are respectfully submitted, on the case as it appears in the correspondence.

Two points are conceded in his lordship's communication, and which form the basis of the claim put forward by the United States: First, "It is not disputed that, in the case of a vessel arrested upon an alleged breach of the English act of Parliament bearing on the question, additional breaches may be assigned;" and, second, that "it was never intended that the naval authorities should take upon themselves to decide questions which undoubtedly could only be decided by a British court of admiralty."

But it is sought to qualify and impair both of these propositions by assuming, in connection with the conceded admissibility of supplementary evidence and "the assignment of additional breaches of the British act," that the naval officers making such seizures "should be in a position to adduce evidence of such additional breaches;" and this is followed by the allegation that "there was, up to the time of release, no allegation of any such charge."

It cannot be doubted that the date of the judicial hearing is the date up to which evidence authorizing the seizure and assigning additional breaches relates, and not the date when the accused vessel was handed over to the naval officer of her own nationality for the express purpose of having her seizure (as provided by the British act) subjected to examination and adjudication in the civil court, and that the assumption of judicial functions by such naval officer, and his decision that no case has been then adduced or will be made out by the time of trial, is wholly without warrant and is in violation of the British act as well as of the spirit and letter of the award.

It is therefore begging the question to allege that, because vessels cannot be condemned for any other offenses or "upon any other charges than those which were the subject of the Bering Sea award and consequent legislation," that British naval officers are justified, when receiving accused vessels from American captors for the sole and express purpose of sending them for trial in the civil courts,

in anticipating the date of such trial and the evidence which may then and there be forthcoming, either under the original charge or under such additional breaches of the British act as may then be assigned; for this would be the assumption of judicial functions by a ministerial officer, in plain violation of the provisions of the British statute, and of the award, whose execution it was intended to enforce.

As to the concluding paragraph of Lord Salisbury's note it would seem sufficient to say that, while we admit that the authority for the arrest by a naval officer of the United States of a British sealing vessel is restricted by the terms of the British statute and the award it recites and professes to carry into execution, yet the mere allegation by such officer that he was proceeding under the authority of the act of Congress (both acts being in *pari materia*, although not identical in terms and in cooperative execution of an award by which each Government was equally and honorably bound) should not of itself be held to be conclusive, and to warrant the summary release of the vessel without such hearing and trial as were stipulated in the award and the laws of both nations, or to prevent the condemnation of Her Majesty's judicial courts, should evidence be then and there adduced of an infraction of the British statute and violation of the award.

I have, etc.,

T. F. BAYARD.

EXHIBIT 31.

The Acting Secretary of State to Lord Gough.

No. 188.

DEPARTMENT OF STATE,
WASHINGTON, *September 12, 1895.*

MY LORD:

In connection with this Department's note of July 1, 1895, in regard to the inadequacy of the naval force provided by the British Government for patrolling Bering Sea and the North Pacific Ocean during the present season, I have the honor to transmit a copy of a report to the Secretary of the Treasury from Capt. C. L. Hooper, commanding the United States patrolling fleet, dated St. George Island, August 14, 1895, in which it is stated that the British naval officers have made no efforts to enforce the provisions of the Paris award; that only one vessel, H. M. S. *Phœasant*, is in Bering Sea, and that she has taken no active part in the patrol. Captain Hooper further states that the work of sealing up arms, boarding vessels, counting and examining sealskins to ascertain if they correspond in sex and number with the entries in the official logs, or whether any have been shot within the prohibited waters, searching for arms, and guarding the 60-mile prohibited zone has been done and is being done by the United States cruisers unaided by the British naval vessels.

Requesting that you will bring these facts to the attention of your Government,

I have, etc.,

ALVEY A. ADEE,
Acting Secretary.

EXHIBIT 32.

The Secretary of State to the British Ambassador.

DEPARTMENT OF STATE,
WASHINGTON, *October 1, 1895.*

EXCELLENCY :

I have the honor to inform you that from a report dated the 21st ultimo, received at the Treasury Department from Capt. C. L. Hooper, R. C. S., commanding the Bering Sea fleet, it appears that on the morning of August 20 last, in latitude $54^{\circ} 54' 03''$ north, longitude $168^{\circ} 31' 21''$ west, the British sealing schooner *Beatrice*, of Vancouver, was boarded by two officers from the revenue steamer *Rush*, and found to have 147 seal skins on board, while her official log recorded but 64, and that 4 of the skins showed evidence that the seals had been shot, and that he seized the *Beatrice*, her tackle, cargo, etc., for violations of the fifth article of the regulations of the Paris award, set forth in the British act of Parliament known as the Bering Sea award act, 1894.

In view of the report made by Captain Hooper as to the shooting of seals, the Treasury Department has instructed that officer to prepare and file an amended declaration with the commander of Her Majesty's steamship *Pheasant*, specifying the killing of seals with firearms by the crew of the *Beatrice* in Bering Sea, in violation of the sixth article of the regulations referred to and of the Bering Sea award act.

I have, etc., .

RICHARD OLNEY.

EXHIBIT 33.

Opinion of the Attorney General.

DEPARTMENT OF JUSTICE,
WASHINGTON, D. C., *October 3d, 1895.*

THE HONORABLE THE SECRETARY OF STATE.

SIR:

In the matter of the claims presented by the British Government for damages on account of the seizure by United States cruisers of the British sealing schooners *Wanderer* and *Farovite*, I have the honor to give my opinion as requested by your letter of September 27th.

It appears from the letters of the Secretary of the Treasury to yourself, dated June 12th and September 24th, which you enclose, that these schooners were seized by American cruisers, one in the North Pacific Ocean June 9th, 1894; the other in Behring Sea August 24th, 1894, and delivered to British naval officers with a written statement of the facts upon which the seizures had been made, which officers, without in anywise invoking the action of the courts, released them, having reached the conclusion, after investigation and upon legal advice, "that no case could be made out against them."

The British naval officers, in releasing the schooners, apparently proceeded on the theory that they were invested with the authority of an ordinary examining magistrate or court to determine whether the accused vessels should be subjected to regular judicial inquiry or not. So acting, they seem to have held that the statements of the United States commanders, as well as the facts developed by their own investigation, failed to show even probable cases of violation of the laws for the preservation of the fur seals passed in pursuance of the Award of the Tribunal of Arbitration at Paris under the treaty between the United States

and Great Britain, concluded at Washington February 29th, 1892. (See Act of Parliament, April 23, 1894, 57 Viet., ch. 2, 31 L. R. Stats. 4.)

The statements made and delivered by the United States officers were to the effect that prohibited and unsealed fire-arms, together with large numbers of sealskins, were found on board the seized schooners. In the case of the *Wanderer* at least, there were other circumstances of suspicion, such as evasion and concealment. The alleged defects in these statements were that they merely set forth as grounds of seizure the facts above stated, but did not specifically assert that seals had actually been taken contrary to law. In other words, considering the statements as pleadings, they set forth mere evidence and not the ultimate fact.

I find nothing in the British statutes, or in the orders and instructions issued for the due execution thereof, which requires any formal charge by officers making seizures. "An endorsement of the grounds on which it was seized" on the certificate of the vessel is required, when it is returned to enable the vessel to proceed to port for trial (57 Viet., ch. 2, Sec. 2. (1)). Section 12 of the Act of Congress, authorizing seizures of American ships by British officers provides for the delivery with the ship of "any witnesses and proofs on board." (Act approved April 6, 1894, 28 Stats. 52.) The instructions of the Secretary of the Navy to the commander of the United States naval force in Behring Sea, dated May 4, 1894, a copy of which was sent by the Secretary of State to the British Minister (Sen. Ex. Doc. 67, 53d Congress, 3d session, page 124) required the commanding officer making the seizure to draw up a declaration in writing and deliver the same with the vessel, whether such delivery should be made to British or American authorities (*id.* 126). I have found no similar requirement in the British Act, Orders in Council, or instructions, and the declarations directed by the instructions to American officers were merely intended to carry out Sec. 12 of the Act of Congress. These, as well

as the endorsement on the certificate above mentioned, were manifestly required, not for the purpose of justifying the seizures to other naval officers to whom delivery might be made, but to indicate evidence for use in the courts where proper charges would be formulated from the evidence produced. As all seizures are to be made by naval officers and the vessels seized delivered to other naval officers, when not taken direct to the judicial authorities, it could not have been expected that the niceties of legal procedure should be observed in such statements.

The authority of American cruisers to seize British ships is found in the Act of Parliament above cited and in the Orders in Council authorized thereby, which bear date April 30, 1894. Section 1 of such Orders provides that American officers may "seize and detain any British vessel which has become liable to be forfeited to Her Majesty under the provisions of the recited Act, and may bring her for adjudication before any such British Court of Admiralty as is referred to in section 103 of 'The Merchant Shipping Act, 1854' (which section is set out in the second Schedule to the recited Act), or may deliver her to any such British officer as is mentioned in the said section for the purpose of being dealt with pursuant to the recited Act."

The mode provided by the Behring Sea Award Act for dealing with vessels so seized is to subject them to legal proceedings in the British courts (Second Schedule, Section 103). Section 2 of said Orders in Council, which relates to the conduct of British cruisers seizing American vessels, provided that "such officer, after seizing and detaining a ship of the United States in exercise of the said powers, shall take her for adjudication before a court of the United States having jurisdiction to adjudicate in the matter, or deliver her to any naval or revenue officer or other authorities of the United States." While it is not explicitly stated, it is manifest that the intention was to substitute delivery to the naval authorities of the country to which the vessel be-

longs in place of delivery to its judicial authorities, merely for convenience and not for the purpose of dispensing with legal proceedings or having a trial by such naval authorities instead. Such delivery is a mere transfer of custody.

The law of each country requires that its vessels, when seized by its own cruisers, shall be brought into court for adjudication (Second Schedule, Act of Congress, *supra*, Secs. 9 and 11), and intended to give to the cruisers of the other country the same rights given those of its own (Act of Parliament 3, (3), Act of Congress, Sec. 12).

It may be suggested that the commander of a cruiser conducts an investigation in deciding whether to seize or not to seize, and further that, after seizure, he may revoke his decision and release. But two things would prevent the conclusion that a naval officer, to whom delivery is made of a vessel seized under the provisions of the treaty, has power either to review or to investigate anew. One is the spirit of comity shown by the Acts of both countries, which requires a construction thereof not inconsistent with mutual confidence and respect. The other is that the power of British officers receiving seized vessels from American cruisers is expressly limited to bringing them into court for adjudication. (Orders in Council, Section 1, Second Schedule Behring Sea Award Act. Section 103).

Nothing is said in the Act of either country about liability for wrongful seizures. If it be conceded, upon principles of comity or otherwise, that such liability was contemplated, it must be assumed that both countries had in mind the well-settled principles of the law common to both relative to such liability.

While the Acts of both countries are, of course, directed only against actual cases of unlawful seal fishing, it would be absurd to limit the right of seizure thereby conferred upon each other's cruisers to vessels caught in the act. In all other cases action must depend upon evidence and indications. This was recognized by the authorities of both

countries. See Instructions of Secretary of the Navy, *supra*, p. 126, which adopts from "Instructions to British Cruisers as to seizure" sent by the British Minister to the Secretary of State (Senate Ex. Doc., *supra*, 116) the following: "whether the vessel has been engaged in hunting you must judge from the presence of seal skins or bodies of seals on board, and other circumstances and indications." The possibility of mistakes in such cases is well known. Certainly it could not have been intended by Great Britain to have liability for wrongful seizures by American officers depend upon any different rules from those expressly made applicable to seizures by its own. These are merely the rules of the common law in the analogous case of groundless arrest or prosecution by the civil authorities. There is no liability in any case where reasonable grounds for the seizure are shown, even when the court has discharged the vessel. (Second Schedule, *supra*, Sec. 103.)

The schooners in question, having been seized by due authority, have never been lawfully discharged. It is not even suggested that the American officers who made the seizures did not act in good faith, and they seem to have acted on reasonable grounds of suspicion. My opinion, therefore, is that the Secretary of the Treasury is right in holding that there is no liability for damages on account of such seizures, assuming that there was, in fact, no violation of law by either of the schooners seized. While voluntary release by the seizing officer might dispense with judicial discharge as one of the conditions of liability, this would result only because such release would be an admission of innocence. It will hardly be claimed that the release by British naval officers operated as an admission by the American officers who made the seizure.

Very respectfully,

JUDSON HARMON,
Attorney General.

EXHIBIT 34.

The Secretary of State to the British Ambassador.

No. 363.

DEPARTMENT OF STATE,

WASHINGTON, *April 9, 1896.*

EXCELLENCY :

Your note of the 19th ultimo preferring, on behalf of Her Majesty's Government, certain complaints in regard to the proceedings of the United States revenue cruisers in searching and seizing British sealing vessels in Bering Sea and the North Pacific without, it is alleged, sufficient cause appearing therefor, heretofore acknowledged by me on the 25th ultimo, having been referred to the Secretary of the Treasury for consideration, I am now in receipt of Mr. Carlisle's reply, the substance of which I have the honor to embody herein as expressing the views of this Government in regard to the matter.

Three general grounds of complaint are specified in your communication concerning the patrol by the Treasury Department, during the past season, of the North Pacific Ocean and Bering Sea, under the Paris award and the legislation enacted by Great Britain and the United States, respectively, for enforcing the same. These complaints may be summarized as follows :

1. That the seizures of vessels for alleged offenses were made by officers of this Government on evidence obviously insufficient.

2. That the right of search was exercised in cases where there was no just ground to suspect that an offense had been committed.

3. That the interference of United States revenue cutters in the operations of British sealing schooners was vexatious and inquisitorial.

As to the first ground of complaint, that British sealing schooners were seized for alleged offenses on evidence obviously insufficient, it appears that three British sealing vessels were seized by American cruisers during the past season—namely, the *Shelby*, in the North Pacific Ocean, May 11, and the *Beatrice* and the *E. B. Marvin* on August 20 and September 2, respectively, in Bering Sea. Of these vessels the *Shelby* was condemned by British court; the *E. B. Marvin* was acquitted, but without costs, the court deciding that there was reasonable cause to believe that she had violated the law and that the seizure, therefore, was justifiable; and the *Beatrice* was acquitted on the ground that the failure of the master to make the log entries required by the Paris award was not a violation of the Bering Sea award act for which the vessel could be forfeited.

These facts, it is believed, will satisfactorily indicate the discretion and good judgment shown by our revenue-cutter officers in making these seizures, and will demonstrate that the evidence of guilt was not “obviously insufficient.”

As to the second ground of complaint, that the right of search was resorted to when no just suspicion existed that an offense had been committed, it appears that information was received by the Treasury Department that during the season of 1894 the law was violated systematically by pelagic sealers, by having shotguns concealed on board of the vessels and using them in killing seals in Bering Sea; also that the log entries showing the sex of seals killed were systematically falsified.

Under such circumstances commanding officers of revenue vessels could satisfy their suspicions only by making a thorough search of the sealing vessels met with during the patrol. It would plainly be almost impossible to detect a vessel actually in the act of violating the law by killing seals in the closed season or by firearms in Bering Sea. It therefore became necessary to board the vessel, to break out the cargo, and to inspect the skins thoroughly to ascer-

tain whether they appeared to have been shot, if in Bering Sea, or whether they appeared to have been freshly killed, if in the closed season.

In view of the dissatisfaction expressed in the communication of your excellency, this Government can only repeat the expression heretofore made of its deep regret that the regulations for the season of 1894, agreed upon by Great Britain and the United States, as to sealing up arms and equipments, could not have been continued during the season of 1895. Those regulations provided an easy and simple mode of satisfying the searching officer that no breach of law had been or could have been committed. By sealing up the arms and equipments much annoyance, which otherwise would be inevitable, was avoided both by the master of the schooner and by the searching officer. Inasmuch, however, as Her Majesty's Government refused to agree for the season of 1895 upon a continuance of the regulations permitting this sealing up of arms and equipments, or, in fact, upon any regulations, the only recourse left to the Treasury Department was to order its officers in all cases to make careful and thorough search as to infractions of the law, whether by the use of contraband weapons or in forbidden seasons.

In this connection it may be proper to state that during the past season the masters of twenty-eight British vessels at Unalaska applied to the officers of the Treasury Department to have their firearms sealed up, and expressed great dissatisfaction at the refusal of the officers to accede to their requests.

As to the third ground of complaint, that the officers of the patrol fleet had been guilty of vexatious and inquisitorial interference, it seems necessary only to renew the assurance that there was no interference except a careful examination of the vessel and cargo to ascertain whether the skins were shot or freshly killed in violation of the award and the British act of Parliament and orders in coun-

cil. It is respectfully submitted that the right to seize and detain vessels, given to officers of the United States by the Bering Sea award act and the orders in council, confers by necessary implication the right to search; and it is further submitted that the right of search thus implied is as complete as in the somewhat analogous case of searching neutral vessels for contraband of war. Until the vessel is visited and searched it can not appear whether its purpose is legal or illegal, whether it is licensed or unlicensed, whether, in short, it has violated the law or obeyed it.

It is further claimed in the communication of your excellency that seizures under the act of Parliament can only be made in cases where the British act has been violated; that under the British act and orders in council there is no power of seizure merely because of the possession of forbidden sealing apparatus and implements.

Nothing is contained in the instructions to the revenue-cutter officers inconsistent with this claim. On the contrary, these officers have been carefully instructed that the power to seize British vessels is limited to violations of the British act, and must be exercised under British orders in council. If the officer has reasonable cause to believe that an offense has been committed, he is authorized, as this Government understands, to seize the vessel under the British law. To ascertain whether or not an offense has been committed, the officer must examine the vessel, for otherwise there could be no seizure except where the vessel is caught in the very act of violating the law, which would rarely happen.

As to the reference in your communication to an agreement with the Secretary of the Treasury in the year 1894, that the instructions to officers of the United States should be similar to those given to the officers of the British navy, your attention is invited to the following extract from the instructions to British naval officers engaged in the patrol for the year 1894, transmitted to this Department by the

Hon. W. P. Roberts. The letter of Mr. Roberts also incloses a copy of a letter from the secretary of Rear-Admiral Stevenson, of the British navy, in which it is stated that the instructions for 1895 were precisely similar to those of 1894.

If the vessel which appears to be a sealing vessel is found in any waters in which at the time hunting is prohibited, the officer in command of Her Majesty's ship should ascertain whether she is there for the purpose of hunting, or whether she has hunted, or whether she was carried through by stress of weather, or by a mistake during a fog, or is there in the ordinary course of navigation on her passage to any place. If he is satisfied that the vessel has hunted contrary to the act, he will seize her and order her to proceed to a British port hereinafter mentioned; but, if the officer is of the opinion that no offense has been committed, he should warn her and keep her as far as he thinks necessary and is practicable under supervision. He must judge from the presence of sealskins or bodies of seals on board and other circumstances and indications whether the vessel has been engaged in hunting.

The above instructions plainly contemplate that every ship overhauled by a cruiser shall be carefully searched and examined for the purpose of ascertaining whether or not a violation of the law has been committed. Although limited in terms to areas in which seal hunting at the time is prohibited, yet clearly their spirit would seem to apply to searches in Bering Sea, where seal hunting by firearms is at all times prohibited. The right of search plainly implied by these instructions has, however, rarely if ever been exercised by British cruisers, for the reason that during the season of 1894, although the United States Government furnished twelve vessels for the patrolling fleet, at an expense, excluding pay of officers, crews, and rations, of \$190,554.49,

only one patrolling vessel was furnished by the British Government. Furthermore, during the season of 1895, although five United States revenue vessels patrolled the award area, at an expense of \$69,064, only one, the *Pheasant*, was furnished for the patrol by the British Government. Furthermore, our official reports are to the effect that the *Pheasant* remained almost constantly in Unalaska Harbor during the season when sealing was permitted in Bering Sea, taking no part in the patrol.

The reference in the communication of your excellency to the protest annexed to the letter of Isaac A. Gould, owner of the schooner *Katherine*, as to the action of the United States revenue cutter with regard to the schooners *Webster* and *Willard Ainsworth* will receive most careful investigation by the Treasury Department. It may also be added that the form of clearance to be granted in the future by the revenue-cutter officers stationed at the island of Atton to British sealing vessels omits any reference to the President's proclamation or to the legislation of Congress.

I have etc.,

RICHARD OLNEY.

EXHIBIT 35.

The British Ambassador to the Secretary of State.

BRITISH EMBASSY,
WASHINGTON, *June 25, 1896.*

SIR:

With reference to your note No. 201, of September 19 last, and to previous correspondence in regard to the presence of counsel on behalf of the United States Government at the trials of British vessels seized for violation of the provisions of the Bering Sea Award act, I am authorized by Her Majesty's secretary of state for foreign affairs to

inform you that Her Majesty's Government see no objection to the cases being watched, as proposed, by counsel for the United States Government, and that they are willing that the counsel so employed should be permitted to examine the pleadings and to make suggestions to the Government counsel.

Such suggestions should, however, be confined to the object of protecting United States interests, and could not be admitted as regards the enforcement of the Bering Sea Award act, the enforcement of that act being the duty of Her Majesty's Government.

I have further been instructed, while signifying to you the assent of my Government, with the limitations specified above, to the proposal made in your note above mentioned, to ascertain the views of your Government on the following point:

In existing circumstances Her Majesty's Government are unable to consent to the United States Government being recognized in the trials in question as a party to the litigation with a "locus standi" before the court; but the situation would be altered if the United States Government were to enter into an agreement to satisfy the judgment of the court if the seizure should be held to be wrongful. They would then have an interest in the result of the case which would make it reasonable that they should in some form take an active part in the conduct of the proceedings.

The officer who actually made the seizure might become formally responsible for the conduct of the prosecution and for any damages which the court might award, and if the United States Government should be unwilling to assent to such an agreement for the payment of damages merely upon the terms of being admitted to watch the case and make suggestions, an arrangement might be made under which they should employ solicitors and counsel and conduct the prosecution of the suit in the name of the Crown. This would insure that the United States case would be pre-

sented to the court not only adequately, as at present, but in a manner consonant with their special views in each particular instance.

Her Majesty's Government would be glad to learn whether this suggestion meets with the approval of your Government, and to receive any observations upon it which they may wish to offer.

I have, etc.,

JULIAN PAUNCEFOTE.

EXHIBIT 36.

Opinion of the Court in the Case of the E. B. Marvin.

(4 Exchequer Reports of Canada, 457.)

DAVIE, C. J. L. J.:

This was an action for the condemnation of the British vessel *E. B. Marvin*, her equipment and everything on board of her, and the proceeds thereof, instituted by Arthur Yerbey Moggridge, commander in H. M. S. *Royal Arthur*, on behalf of Her Majesty, on the ground that at the time of the seizure presently mentioned the said vessel was in the Behring Sea fully armed and equipped for taking fur seals, and was engaged in fur seal fishing in the Behring Sea from the 9th August, 1895, to the 2d September, 1895, continuously, and did during the said time use firearms and explosives for the purpose of killing fur seals, contrary to *The Behring Sea Award Act*, 1894.

The facts of the case, as proved before me, show that the said vessel, William Douglas Byers, master, left the port of Victoria on the 11th January, 1895, for the North Pacific on a fur sealing voyage, fully manned and equipped with the necessary outfit for seal fishing, including a supply of firearms and explosives. *The Bering Sea Award Act*, 1894, which, by article 6 of the first schedule, makes it unlawful

thereafter to use firearms and explosives in fur seal fishing, came into force on the 23d April, 1894, after the *Marvin* had left Victoria and whilst she was prosecuting her voyage. On the 18th of June, 1895, Captain Byers received notice of the Act, with instructions to proceed to Copper Island for the purpose of getting his firearms sealed up, and on the 27th July reported with his vessel to Captain Carmine, the American custom house officer at Copper Island, who informed him that he had no authority to seal up his arms and ammunition, but after making a manifest of the things on board gave Captain Byers a clearance permitting his vessel to proceed to the Behring Sea for the purpose of hunting seals. The manifest with which Captain Byers went to sea from Copper Island included 1,152 loaded brass shells, 903 empty brass shells, and 138 empty paper shells. Having proceeded on her voyage, the vessel was overhauled and searched, but allowed to go free on the 21st August by the U. S. S. *Grant*, and by the U. S. S. *Perry* on the 26th August, and on the 2d September, after the hunters had left the vessel for the day's sealing, the U. S. S. *Rush* hove in sight and boarded her. The cargo then on board of 336 seal skins was diligently examined by the officers of the *Rush*, and, with the exception of one skin, showed no appearance of anything but spearing. In one skin, however, a hole was discovered which might have been caused by a bullet or buckshot, and the officers of the *Rush* believed that it was so caused, and a count of the ammunition on board showed a considerable difference from the manifest; the actual count made by the officers of the *Rush* showing 1,081 brass shell cartridges loaded, 734 brass shells empty, 44 paper shells loaded and 170 paper shells empty. Under these circumstances the *Marvin* was placed under seizure.

The hunters came home in the afternoon of the same day with a further catch of some forty seals, all taken apparently in a perfectly legitimate manner, as the hunters had neither firearms nor ammunition in their boat.

The *Marrin* was taken to Ounalaska and there handed over to Lieutenant Garforth, of H. M. S. *Pheasant*, who again counted the ammunition. His count differed somewhat from that of the *Rush*, and besides those cartridges and shells formerly counted by the officers of the U. S. vessel, two cardboard boxes of empty brass shells were produced by Captain Byers from the *Marrin*'s lockers, making together, with those already counted, a total of loaded and unloaded brass and paper cartridges and shells amounting to 2,194, or within one of the number appearing on the manifest, but differing in kinds—Lieutenant Garforth's count showing 1,104 brass shells loaded, as against 1,152 on the manifest; 742 brass shells empty, as against 903 on the manifest; 305 paper shells empty, as against 138 on the manifest, and 43 paper shells loaded, while there were no paper shells loaded on the manifest.

Captain Byers tells us that when the officers of the *Rush* made their count, he knew that there were more shells somewhere, and asked the officers to wait until the hunters came back, as they would probably know where the missing shells were, and that when the hunters came back, they did inform him of the shells which were afterwards produced from the lockers. He further tells us that the count made at Copper Island and appearing on the manifest was made by the hunters, whose word was taken for the number entered on the manifest. He accounts for the discrepancy between paper and brass shells by the one being then mistaken for the others.

I am of opinion that Captain Byers' explanation is a reasonable one. Upon inspection of the cartridges I observe that the butt of the brass and paper cartridge is identical, both being of brass, and I can very well believe that in counting them in the boxes this mistake might easily have occurred. I attach no importance to the hole in the skin. Mr. Lubbe, a fur dealer, who was called as a witness, whilst expressing his belief that a hole pointed out by him was a

buckshot hole, pointed out a different hole and one which had not been perceived by the officers of the *Rush*. I am by no means persuaded that either hole was caused by a shot, although of course either might have been; but then again, even if caused by a shot, it by no means follows that the shot was from the *Marrin*. On the contrary, it is quite possible that if the hole was a shot wound such shot might have been fired by a stranger some time before, for Mr. Lubbe tells us that the wound would not heal over for two or three weeks, and he also tells us that it is no uncommon thing to find nests of old shot in the skins of seals killed by spearing or in other ways. Captain Byers, who gave his evidence in a straightforward and unequivocal way, assures us that no shooting whatever took place, and the fact that the hunters came back after the seizure without arms or ammunition, and the further fact that no indication whatever of shot were found in any of the other skins, and the tally, within one, of the total count on the manifest, strongly corroborate him.

I think that the discrepancy at first in the number and in the kind between the ammunition found and that described in the manifest created sufficient suspicion to warrant the arrest; but this suspicion, I think, has been satisfactorily cleared up by Captain Byers.

The suit will, therefore, be dismissed without costs.

Judgment accordingly.

EXHIBIT 37.

The Case of the Ship Beatrice.

(5 Exchequer Court Reports of Canada, 160.)

British Columbia Admiralty District.

HER MAJESTY THE QUEEN, Plaintiff,
and
THE SHIP "BEATRICE," Defendant.

*Wrongful arrest of merchant ship by Crown—Damages—
Interest.*

Where a merchant vessel was seized by one of Her Majesty's ships, acting under powers conferred in that behalf by *The Behring Sea Award Act*, 1894, and such vessel was found to be innocent of any offence against the said Act, the court awarded damages for the wrongful seizure and detention together with interest upon the ascertained amount of such damages.

This was an assessment of damages taken pursuant to the judgment delivered on the 18th November, 1895, dismissing the action for condemnation of the ship, and directing a reference as to the damages to which the ship was entitled for her illegal arrest and detention. The main case is reported in Exchequer Court Reports, vol. 5, page 9.

Hon. C. E. Pooley, Q. C., appeared for the Crown;

A. E. M. McPhillips, Esq. (with him *G. H. Bernard*), for the owner of the *Beatrice*.

DAVIE (C. J.), L. J., now (July 28th, 1896) delivered judgment.

This was an assessment of damages arising out of the seizure of the sealing schooner *Beatrice* by the United States revenue steamer *Rush* on the 20th August, 1895. Upon the trial before me of the action for condemnation of the ship for alleged infraction of the *Behring Sea Award*

Act, 1894, I dismissed the action on the ground that the seizure was unlawful, and I directed a reference as to the damages sustained by the owners of the *Beatrice* on account of her unlawful arrest and detention.¹

The arrest took place on the 20th August, 1895, in latitude 54.54 north and longitude 168.31 west, whilst the vessel was engaged in seal fishing. She had then caught 202 seals, having an outfit of six boats and two canoes and a crew of 18 white men, but no Indians. She had been fishing since the 2d of August, and under instructions to the master given by the owner would probably have continued fishing until the end of the season, which is shown to be the 20th September, several of the vessels having continued until that date, making good catches up to the last day; for instance, the *Walter Rich* caught 72 skins on the 9th September, and 36 on the 18th; the *Ainoko* 137 on the 9th September, 36 on the 17th and 54 on the 19th; the *Florence M. Smith* took 69 on the 20th September. These vessels were all sealing in Behring Sea the same as the *Beatrice*, and although they had more boats and more men than the *Beatrice* it is useful to refer to their catches as showing that it would have probably been profitable for the *Beatrice* to have continued sealing up to the last day. There were some forty vessels, including the *Beatrice*, sailing out of Victoria engaged in sealing that year, and Mr. Godson, whose duty it was under the Paris award to keep a record of the industry, informs us that the average catch per schooner was 897.95, or of about 70 to each boat or canoe. It has been contended on the part of the Crown that in assessing damages I should proceed upon the average catch per boat, but I think this would afford hardly a fair estimate for the *Beatrice*.

In the first place, Mr. Godson's average includes the catch of the *Beatrice*, which had only just commenced sealing when seized, as also of the *E. B. Marvin*, which was seized on the 2d September when she had caught only 376

¹ See 5 Ex. C. R., 9.

seals. These seizures, therefore, reduce the average which would otherwise be shown. Moreover, many of the other vessels had quit sealing before the 20th September, whereas the *Beatrice* was provisioned to, and had instructions to continue until, the 20th. The catches are shown to have been heavier after the 20th August than they were before that date. Some of the vessels took as high as one hundred and more to the boat; the *Borealis*, a vessel of only 37 tons register, with twenty-one white men and six boats, taking as high as 123 seals to the boat.

The seizure in this case having been established as wrongful, the defendant is entitled to substantial damages, the criterion of which is the whole injury which he has sustained thereby. In the *Cousett Case*,¹ where a charter-party was lost in consequence of detention caused by a collision in which the defendant was to blame, the measure of damages was held to extend to the loss of the charter. The defendant's case here stands upon at least as high a footing as that of the *Cousett*.¹ Here, I think I am bound to allow such an amount as would represent the loss of an ordinary and fair catch if the voyage had been extended until 20th September.² I think that 90 seals to the boat would have been an ordinary and fair catch for the *Beatrice* to have made; as the *Borealis* with only three more men took 123 seals, it is not unreasonable to presume that the *Beatrice* would have taken at least 90. This, for eight boats, including canoes, would make 720 seals, or 518 more than were taken.

The evidence shows that the agents for the *Beatrice*, R. Ward & Co., who were also the agents for several of the other schooners, sold all of their catches at Victoria, and realized \$10.25 per skin, including the 202 caught by the *Beatrice* before she was seized. I think the same price must be allowed the *Beatrice* for her estimated additional

¹ L. R. 5 P. D., 232.

² *The Argentine*, L. R., 14 App. Cas., 519.

catch of 518 seals, or \$5,309.50. From this has to be deducted \$4 per skin, which it was proved would amply cover all expenses of the lay to which the sealers would have been entitled as well as all wages. There will also be deducted \$74 for the tinned goods and two barrels of beef which would probably have been consumed had the *Beatrice* completed her voyage, but which Mr. Doering had restored to him after the vessel was released. The remainder of the provisions were mildewed, eaten by rats and spoiled whilst the vessel was under arrest. There can be no deduction in respect of these. These deductions leave a balance of \$3,163.50 in favor of Mr. Deering, for which sum, together with interest at the rate of 6 per cent per annum from the 20th of September, he is entitled to judgment against Her Majesty, with costs.

Judgment accordingly.

EXHIBIT 38.

The Case of the Ship Aurora.

(5 Exchequer Reports of Canada, 372.)

British Columbia Admiralty District.

HER MAJESTY THE QUEEN, Plaintiff,
and
THE SHIP "AURORA," Defendant.

Maritime law—Behring Sea Award Act, 1894—Circumstances justifying arrest—Burden of proof.

A vessel had on board, within prohibited waters, certain skins with holes in them which appeared to have been made by bullets.

Held, that this was sufficient reason for the arrest of the vessel, and that the burden of showing that firearms had not been used was imposed on such vessel.

This is an action *in rem* for condemnation of the ship for an alleged infraction of the regulations respecting the taking of seals in Behring Sea.

C. E. Pooley, Q. C., for the Crown;

H. D. Helmcken, Q. C., for the ship.

By the statement of claim it was alleged as follows:

1. The ship *Aurora* is a British vessel registered at the port of Victoria, in the province of British Columbia.

2. The said ship *Aurora*, Thomas H. Brown, master, was seized by W. H. Roberts, a captain in the Revenue Cutter Service of the United States, commanding the United States revenue steamer *Bush* on the 10th day of August, 1896, in the Behring Sea, in latitude 55 degrees 44 min. 30 secs. N., longitude, 172 degrees 11 min. W. from Greenwich.

3. The said ship *Aurora* at the time of her seizure as aforesaid was fully manned and equipped for the purpose

of killing, capturing or pursuing seals, and had on board thereof firearms and ammunition, loaded cartridges, powder and shot, and ball, and had also on board at the time of her said seizure one hundred and twelve fur seal skins including four fur seal skins which had been killed in the Behring Sea by the use of firearms by some person in such ship.

4. The said ship *Aurora* was continually engaged in fur seal fishing from the first day of August to the tenth day of August, 1896, inclusive of the date of the seizure aforesaid and during all this time had on board guns, rifles, shooting implements and loaded cartridges and empty cartridge cases for use in the said guns and rifles, and also powder and shot and the necessary apparatus for filling cartridges; and during the times between the said first day of August and the said tenth day of August did employ and use the said guns and firearms and explosives in the fishing for, and for the purpose of, killing the said fur seals or some or one of them within the waters of the Behring Sea aforesaid.

5. The said ship *Aurora* was sent to Unalaska by the said Capt. W. H. Roberts, and from thence she was ordered by Ernest Fleet, the Commander of Her Majesty's ship *Icarus*, to proceed to the port of Victoria and report to the Collector of Customs, where she arrived on the fifteenth day of September, 1896.

Algernon H. Hotham, a Lieutenant in Her Majesty's ship *Imperieuse*, claims the condemnation of the said ship *Aurora* and her equipment and all on board of her and the proceeds thereof, on the ground that the said ship at the time of the seizure thereof was in the Behring Sea fully armed and equipped for taking fur seals, and was engaged in fur seal fishing in the Behring Sea from the first day of August, 1896, to the tenth day of August, 1896 (inclusive) continuously and during the whole of the said time had on board the said ship *Aurora* firearms and explosives and numerous

fur seal skins, and did, during the said time, use the said firearms and explosives for the purpose of killing the said fur seals contrary to the provisions of the *Behring Sea Award Act*, 1894.

The statement of defence and counter-claim were as follows:

1. The defendants admit paragraphs 1, 2, and 6 of the plaintiff's statement of claim.

2. The defendants do not admit so much of paragraph 3 as alleges that at the time of seizure the said ship *Aurora* had on board four fur seal skins which had been killed in the Behring Sea by the use of firearms by some person in such ship.

3. The defendants do not admit so much of paragraph 4 as alleges that between the first and tenth days of August the said ship did employ and use the said guns and firearms and explosives as therein mentioned in the fishing for, and for the purpose of killing, the said fur seals or some or one of them within the waters of the Behring Sea.

4. The defendants say that at the time of her clearance at the port of Attu, and at the time of her seizure the said schooner had in addition to the guns, implements and explosives mentioned in paragraphs 3 and 4, thirty four spears and seventeen spear poles.

5. The said vessel employed six boats for the purpose of killing, capturing and pursuing the said animals known as fur seals.

6. The defendants in answer to the whole of the plaintiff's claim say that the said four fur seal skins were killed in the manner as is by the provisions of the *Behring Sea Award Act*, 1894, allowed and not otherwise.

COUNTER-CLAIM.

7. By way of counter-claim the defendants say as follows: They repeat the several allegations hereinbefore made and say:

1. That the officers making the seizure had no reasonable cause to believe that the said vessel *Aurora* had been used or employed in contravention of the *Behring Sea Award Act*, 1894, or any of its provisions

2. That at the time of the said seizure the said schooner was engaged in lawfully pursuing the killing of fur seals, and at no time during the times alleged was the said vessel engaged or employed or used contrary to the said Act.

3. That the said seizure was illegal.

4. That when the said vessel was under seizure at Unalaska one sealing boat was stolen therefrom with a quantity of provisions amounting in value to \$100.

5. That the defendants have suffered damage by reason of the said seizure and detention of the said vessel.

The defendants claim:

1. The restitution of the said vessel *Aurora* and her cargo and everything on board of her as on the day of seizure.

2. Judgment against Her Majesty for the damage occasioned to the defendants by the seizure and detention of the said vessel *Aurora* and for the costs of the action.

3. Payment of the said sum of \$100.

4. To have an account taken of such damage.

5. Interest at the rate of 6 per cent on the amount allowed from the 20th day of September, A. D. 1896, until judgment.

6. Such further and other relief as the nature of the case may require.

Issue joined.

The case came on for trial at Victoria, B. C., on the 3d December, 1896, before the Honourable M. W. Tyrwhitt Drake, Deputy Local Judge for the Admiralty District of British Columbia.

DRAKE, D. L. J. now (7th December, 1896) delivered judgment.

This vessel, a British schooner, had been sealing around Japan and arrived at Attu, in Behring Sea, on the 20th July, 1896. She had arms and ammunition on board. The Cap-

tain requested Lieutenant Barry, of the United States ship *Grant*, to inspect the arms and ammunition, and a record of all that was then produced was entered in the official log.

They commenced sealing on 1st August in Behring Sea. On 10th August she was boarded by the *Rush*, and the attention of the officer who boarded her was called to four skins which had been put aside as having holes caused by gaffs. He said he did this in pursuance of instructions from Lieutenant Berry, of Attu.

The skins were sent on board the *Rush* and after a careful examination by the officers of the *Rush*, the conclusion arrived at was that these seals had been shot.

The guns and ammunition were examined and checked and some small discrepancy was discovered, which was explained afterwards.

This examination was just as ineffective as the first one spoken of because there was no search of the vessel, and no evidence to show that there was not other ammunition on board. The vessel was ordered to Unalaska, and a further count of ammunition made. While there two of the crew deserted and took away one of the ship's boats and some provisions, a claim for which was made against the Crown by way of counter-claim.

From the evidence adduced, the conclusion I have arrived at is that the seals whose skins were in question had been shot. They had also been speared, but the evidence did not in my opinion establish the fact that the seals had been shot by those on board the schooner.

The reason for putting these skins to one side was difficult to appreciate. The Captain said that the United States officer at Attu had asked him to put aside all skins that had shot or gaff holes in them. As it appears that the majority of seals speared have to be brought to the boat by the gaff, it must follow that gaff holes, if carefully searched for, would be apparent in the majority of skins. The Captain denied that these seals were shot; but stated the holes were

only gaff holes, and that the holes which were in the skins when taken on board the *Rush*, and which are apparent now, were made by rats. Without discussing the evidence in detail there was in my opinion sufficient reason for the arrest of this vessel, and the burden of showing that firearms had not been used was imposed on the vessel.

I therefore dismiss the claim with costs.

With regard to so much of the counter-claim as relates to a boat and provisions being stolen while the schooner was in charge of the authorities at Unalaska, it was shown that the master was in command and had full control of the crew and that two of the crew deserted and stole a boat and some provisions.

The seizure of the vessel, therefore, had nothing to do with the stealing of the boat. I therefore dismiss the counter-claim, without costs.

Judgment accordingly.

EXHIBIT 39.

The Case of the Carlotta G. Cox.

(XIII British Columbia Reports. 460.)

Admiralty law—Seizure and condemnation—Behring Sea Award Act, 1894—Illegal sealing—Evidence of offence—Onus—Failure to make entries in official log—Seizure by United States Revenue Cutter—“Duly commissioned and instructed.”

Defendant schooner was on the 29th of May boarded by an American revenue cutter in pursuance of the Behring Sea Award Act, 1894, within the prohibited area defined in the Act. She then had among the sealskins on board six skins of freshly killed seals, which the master contended had been killed before the close season commenced (1st of May), and outside the prohibited zone, viz: on the 27th of April:

Held, on the evidence that, the skins were taken during the close season.

Status of an officer "duly commissioned and instructed" by the President of the United States of America to seize a British vessel pursuant to the Behring Sea Award Act, 1894, considered.

Remarks on the effect of said act since the field of pelagic sealing in Behring Sea has been entered by subjects of a power not a party to the agreement between Great Britain and the United States of America under the statute.

Action tried before Martin, Lo. J. A., at Victoria on the 4th of February, 1908, for the condemnation of the *Carlotta G. Cox*, under the provisions of the Behring Sea Award Act, 1894.

Peters, K. C., for the Crown.

Luxton, K. C., for the ship.

7TH MARCH, 1908.

MARTIN, Lo. J. A.:

On the 29th of May, 1907, shortly after 7 a. m., the sealing schooner *Carlotta G. Cox*, John Christian, master, a British vessel registered at Victoria, was boarded, searched and detained by the United States revenue cutter *Rush* in the North Pacific Ocean off Yakutat Bay, in latitude $59^{\circ} 10''$ N. and longitude $141^{\circ} 19''$ W., being suspected of contravening the Behring Sea Award Act, 1904, which, *inter alia*, forbids subjects of Great Britain and the United States of America from pursuing, killing or capturing fur seals during the close season (beginning on the 1st of May and extending to the 31st of July) on the high sea north of the 35th degree of north latitude and eastward of the 180th degree of longitude. Later, and on the 4th of June, the schooner was formally seized at Sitka, where she had been towed by the *Rush*, and she was thence towed to Port Simpson, B. C., where she was handed over to Captain Hackett, commander of the Canadian Government steamer *Quadra*, who arranged with Captain Christian that he should take the schooner to Victoria and deliver her to the collector of customs there, which was done.

At the time of the first searching on May 29th, there were 77 fur seal skins in the schooner's salt room, of which the

six top ones were very green, with blood on them so fresh that it soiled the fingers; the 7th and following skins were quite distinct in appearance, not fresh nor moist, but cured. On the 4th of June when these skins were again examined they had changed in appearance so that they could not be distinguished from the others; when the said six were first seen they had a thin layer of salt on them. The schooner's log was not written up, but the master said he had a notebook with pencil entries which he produced and said contained the particulars of seals killed, from which he claimed to be able to make the entries in the log required by Article 5 of the First Schedule of said Act, and later he did, before reaching Sitka on the 4th of June, make certain entries therein shewing his total catch to be 133, out of which 56 skins had been landed at Hesquiat, V. I., on April 22d, for shipment to Victoria.

The schooner was fully manned and equipped for sealing and was admittedly within the prohibited area when seized, but the contention of her captain is that all the seals had been taken before the close season and outside of the prohibited area. At the time she was first discovered, about 6 a. m., by the *Rush* she was lying-to, not sealing; the weather was clear, and Mount St. Elias could be distinctly seen, 68 miles away. That locality is well known to sealers as the Fairweather sealing grounds and fur seals had been seen by the *Rush* in the vicinity for several days before, and at the time of search a Japanese sealer was engaged in sealing within five or six miles of the *Carlotta G. Cox* with several boats out, and other Japanese vessels had previously been sighted sealing in the vicinity and using firearms, the use of which is forbidden British and United States subjects by Article 6 of the said First Schedule; as one of the officers of the *Rush* described it: "Japanese vessels were shooting all round there," and though the *Rush* boarded one of them on the same morning, shortly after she had searched and detained the *Carlotta G. Cox*, nothing

could be done to stop it because Japan is not a party to the Treaty between Great Britain and the United States of America upon which the said Behring Sea Award Act, 1894, is founded.

With respect to the said six green skins I am satisfied, largely upon the convincing evidence of the pilot of the *Rush*, James W. Keen, who has had a long experience in salting, overseeing and examining sealskins in the waters in question, and in connection with seizures, that the seals from which they were taken had been killed within four days before the 29th of May at the outside, and possibly some not longer than 24 hours. But even taking the killing to have been within four days what explanation is offered by the master? Nothing that is satisfactory to this Court, and in the circumstances the entry in his log which states that the last killing of seals took place over a month before, viz: on the 27th of April when 25 were captured, is entitled to no credit. The master was not brought forward as a witness to explain this suspicious circumstance and I have no hesitation on all the facts in rejecting the suggestion that he happened to be in the locality in question hunting for sea otters, or on his way to Kadiak Island or the Shumagin Islands for that purpose. It was laid down by this Court in *The Minnie* (1894), 3 B. C. 161, 4 Ex. C. R. 151, 23 S. C. R. 478; and in *The Shelby* (1895), 4 B. C. 342; and followed by a long line of cases ending with *The Queen v. The Ship Otto* (1898), 6 Ex. C. R. 188; that the statutory onus upon the master to explain his conduct in circumstances similar to these is a strong one, but, like the master in the *Shelby* case, he did not come forward (though this was done, *e. g.*, in *Re Ainoka*, (1894), 3 B. C. 121) to discharge that onus, nor was any reason given for his failure to do so; therefore I am satisfied on all the facts that his schooner was employed in the unlawful killing of seals as charged.

There is a further charge, in paragraph 9, of the statement of claim, that proper entries were not made in the offi-

cial log giving the particulars of killing as aforesaid and the condemnation of the vessel is also asked on that ground, but it has been already decided by this Court in *The Beatrice* (1895), 4 B C. 347, that such neglect is not one which attaches any penalty or forfeiture to the ship, though the master is personally liable to suffer the statutory consequences, therefore it is unnecessary to consider that point in relation to the schooner. With respect to the decision in *The Beatrice* case, it may be that, as Mr. *Luxton* contends, full consideration was not given to section 4 of the said Act, nevertheless Mr. *Peters* is justified in claiming it as an express decision on the point in his favour, by which I am bound.

But the objection is raised that the seizure here was unlawful in that the commander of the *Rush* is not shewn to have been “duly commissioned and instructed by the President” to seize a British vessel, as is required to be done by section 1 of the Imperial Order in Council of 30th April, 1894, or that the name of the United States vessel making the seizure was beforehand “communicated by the President of the United States to Her Majesty as being a vessel so appointed for that purpose,” as is also required by said Order in Council. And it is also objected that the commander of the *Rush* neither brought the schooner “for adjudication before any such British Court of Admiralty” nor “delivered her to any such British Officer as is mentioned in the said section (103 of the Merchant Shipping Act, 1854) for the purpose of being dealt with pursuant to the recited Act” (*i. e.*, Behring Sea Award Act, 1894). Said section 103 is as follows:

“103. * * * And in order that the above provisions as to forfeiture may be carried into effect, it shall be lawful for any commissioned officer on full pay in the military or naval service of Her Majesty, or any British officer of customs, or any British consular officer, to seize and detain any ship which has,

either wholly or as to any share therein, become subject to forfeiture as aforesaid, and to bring her for adjudication before the High Court of Admiralty in England or Ireland, or any Court having admiralty jurisdiction in Her Majesty's Dominions; and such Court may thereupon make such order in the case as it may think fit, and may award to the officer bringing in the same for adjudication such portion of the proceeds of the sale of any forfeited ship or share as it may think right."

In my opinion, even assuming that the commander of the *Rush* was not "duly commissioned and instructed" to seize the schooner, and even though the commander of the *Quadra* to whom she was first delivered is not an officer who can take proceedings against her under said section 103, yet seeing the fact is that she has been brought for adjudication before, and is now before this Court (and in the custody of its marshal) by and at the instance of an officer, Commander Allgood, R. N., who admittedly is within said section 103, and who claims her condemnation for contravention of the Behring Sea Award Act, it is not open to her owners to answer that charge (whatever other remedies they may have) by setting up irregularities in the manner in which she was originally seized or in the means whereby she was ultimately brought within the jurisdiction of this Court, and, later, before it by Commander Allgood, who instructed the writ to be issued on the 29th of November, as appears by the indorsement thereof. According to the principle decided in *The Annandale* (1877), 2 P. D. 179, the forfeiture here accrued at the time the illegal act was done, and I am unable to agree that any of said antecedent irregularities can affect the admittedly regular proceedings in this Court.

The result is, therefore, that I find there has been a contravention of the Behring Sea Award Act, 1894, in the man-

ner aforesaid, by the schooner *Carlotta G. Cor* and I therefore declare her and her equipment and everything on board of her to be forfeited to His Majesty, but, following the precedent established in *Re Ainoka* (1896), 5 B. C. 168, and *The Beatrice*, *ib.*, 171, in case of payment of a fine of £400 and costs within 30 days she, her equipment, and everything on board of her may be released.

Though I have come to this conclusion yet I think it proper to observe that I have not overlooked the strong appeal of the defendant's counsel that this Court should now cast a lenient eye upon these infractions of the Behring Sea Award Act, 1894, since, it is contended, the facts proved in the course of the hearing shew that it has failed of its object and not only places the citizens of Canada at a disadvantage in their commercial enterprises in adjacent waters, but offers special inducements to foreign sealing vessels from *e. g.*, the other side of the Pacific. But however strong a case such facts may found in diplomatic circles for a change in the Act, or other redress, they can have no weight in a court of justice; the sole duty of a judge is to administer the law as it is given to him by that Legislature which has the power to enact it, and therefore I have imposed a penalty as though there had been no change in the condition of affairs since 1894.

Judgment for plaintiff.

EXHIBIT 40.

Opinion of the Court in the Case of the Shelby.

(5 Exchequer Reports of Canada, p. 4.)

Judgment in full (Nov. 17, 1895).

DAVIE, C. J. L. J., now (Nov. 15th, 1895,) delivered judgment:—

The British vessel *Shelby*, Christian Claussen, master, was seized by an officer of the U. S. S. *Corwin* on the 11th May, 1895, in latitude $52^{\circ} 52' 10''$ north and longitude $134^{\circ} 10' 58''$ west, being a point within the prohibited waters of the Pacific Ocean as defined in the *Behring Sea Award Act*, 1894, for an alleged contravention of the Act, such contravention being the employment of the vessel in pursuing seals within the proscribed waters during the period prohibited by law.

By force of the scheduled provisions of the *Behring Sea Award Act*, 1894, which under section 1 are to have the same effect as if enacted by the Act, the pursuit of seals within the aforesaid limit is prohibited, and by subsection 2 of section 1, if there is any contravention of the Act, any person committing, procuring, aiding or abetting such contravention is guilty of a misdemeanor, and the ship employed in such contravention and her equipment, and everything on board thereof, are liable to forfeiture to Her Majesty: provided that the court, without prejudice to any other power, may release the ship, equipment or thing on payment of a fine not exceeding £500.

At the time of her seizure the *Shelby* was fully manned and equipped for killing, capturing and pursuing seals, and had on board implements and seal skins.

By section 1, subsection 6, of the *Seal Fishery (North Pacific) Act*, 1893, which Act was in force at the time of the

seizure, if, during prohibited times and in prohibited waters, a British ship is found having on board thereof fishing and shooting implements or seal skins, it shall lie on the owner or master of such vessel to prove that the ship was not used or employed in contravention of the Act. The Acts of 1893 and 1894 being *in pari materia* are to be read as one Act. (*McWilliams v. Adams*, 1 Macq. II. L. Cas. 120.)

The *Shelby*, therefore, having been found within prohibited waters with seals and implements for taking them on board is to be deemed to have been employed in contravention of the Act unless the contrary be shown.

Has it then been shown that the ship was not used or employed in contravention of the Act? The most important witness to prove this, if such were the case, would clearly have been Captain Claussen, the master; but he was not called, nor has the failure to call him been satisfactorily accounted for. The only reason offered for his absence is that he was away on a fishing expedition. His evidence might have been taken *de bene esse*, but no effort to procure his evidence seems to have been made. The mate, August Reppon, was called as a witness, and stated that the *Shelby* stopped sealing on the 30th April, when the ship's log shows the vessel to have been in latitude $58^{\circ} 30'$ north and longitude $139^{\circ} 30'$ west, and that she then set sail for Victoria. On the 11th of May, after 10 or 11 days' sailing, she was found by the *Corwin* in latitude $52^{\circ} 52' 10''$ north, and longitude $134^{\circ} 10' 58''$ west, a distance approximately of four hundred miles from the point of starting, or less than an average of 40 miles a day. The proper course for the ship to have steered for Victoria was E. S. E. magnetic, but it appears that frequently when the course of the wind as indicated by the log would have permitted that course to be made good the vessel was not headed in that direction. For instance, on 2nd of May she was headed on a southerly course; on May 3rd on a south by west course, and on the 5th of May on an east by north course, whereas the wind on

each of these days was favourable to an east-south-east course. Captain Moggridge states, from an examination of the log, that the schooner ought to have made a considerably greater distance on her course during these days; and in view of the fact, as stated in evidence, that the *Shelby* had a favourable current of nearly a knot an hour, it is clear that she ought to have made a much greater distance. The *Corwin*, in coming from the south to the point where she picked up the *Shelby*, experienced strong head winds, which were favourable winds for the *Shelby*, and the prevailing winds at that time of the year, as shown by the "Coast Pilot," are westerly; also favourable to the E. S. E. course to be made by the *Shelby*.

The *Corwin* seized the *Shelby* for contravention of the Act, placed a crew on board her and ordered her to Sitka, a distance of 260 miles, which she reached under sail in a little over two days. At Sitka the *Shelby* was ordered to Victoria, a distance of about 800 miles, as shown by the chart, which place she made, likewise under sail, in fourteen days.

The mate, when asked to explain why he went out of his course, particularly on the 2nd, 3rd and 5th of May, ascribes the fact to defects in the compass, which he says varies three or four points, but this statement is shown by his own evidence to be an equivocation, and the variations to have had no effect whatever on the course actually made or intended to be made, for whilst it is true that the compass varies, and varies considerably, such variation is regular, known precisely, and duly allowed for. Having committed himself on his examination at the hearing to the variation of the compass reason, which he was compelled to admit on cross-examination was no reason at all, he was by permission of the Court recalled a day or two after the evidence had been closed, and he then ascribed the deviations from the course to the state of the wind.

I find myself entirely unable to place any dependence on the evidence of the mate, Reppon, and this leaves the devia-

tions from the regular course between the 1st to the 11th May, and the fact that 400 miles only was made in ten days, altogether unaccounted for. It is true that Denny Florida, hunter, August Schone, the cook, and Victor Emanuel Laerquest, one of the seamen, all testify, and I have no doubt with truth, that no seals were taken during these days, nor were the boats lowered; but it appears also that none were seen during these days. Their evidence leaves the question of deviations from the course untouched; and, in the absence of evidence explaining it, the only reasonable conclusion is that the deviations were occasioned by the attempt to pursue seals. At all events it has not been proved to my satisfaction that the vessel was not employed in the pursuit of seals during these dates. In *The Queen v. The ship Minnie*, (4 Ex. C. R. 151,) it was held by Crease, J. that the presence of the ship within prohibited waters required the clearest evidence of *bona fides* to exonerate the master of any intention to infringe the provisions of the Act, and that, as his explanation of the circumstances in that case was unsatisfactory the ship must be condemned. This ruling is, I think, in thorough accord with subsection 6 of section 1, and I am bound to follow it. It applies exactly to this case. Here the captain has offered no explanation at all, and the explanation of the circumstances, suspicious in themselves, given by the mate, is unsatisfactory. The vessel, therefore, must be condemned.

I am inclined to think that this is a case, as no actual taking of seals is shown, but negatived upon the evidence, where a fine might meet the justice of the case, instead of forfeiture. I have power under subsection 2 of section 1 of the Act of 1894 to substitute a fine for forfeiture. I will hear counsel upon this point. The costs of suit must follow the condemnation.*

Judgment accordingly.

* By a subsequent order a fine of £100 sterling was substituted for the forfeiture.

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